



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

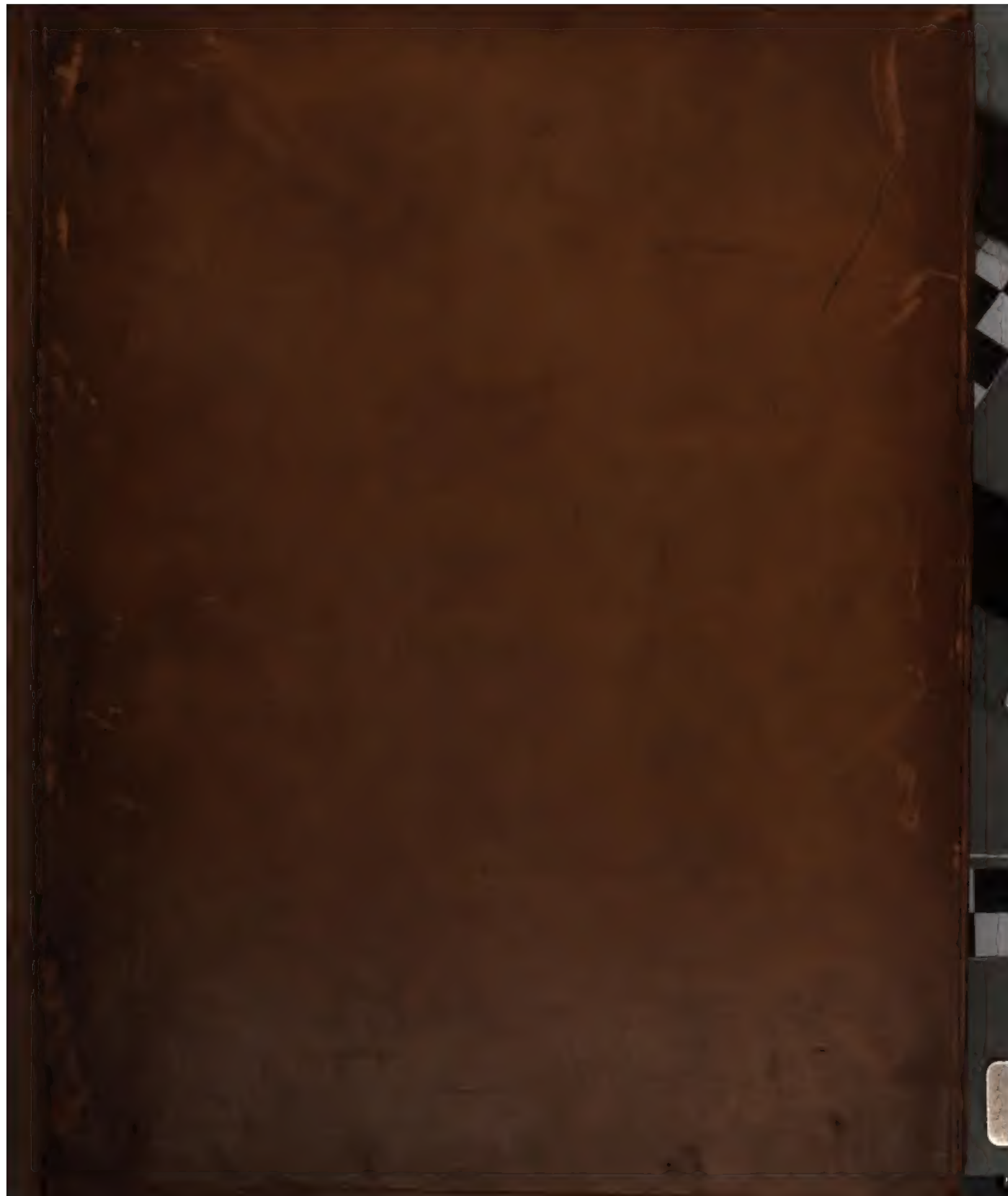
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



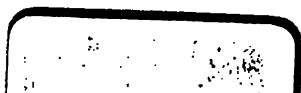


L L.

Cw. U.K.

Scotl. 510

R 827a 2











**LECTURES**  
**ON THE**  
**HISTORY AND PRACTICE**  
**OF THE**  
**LAW OF SCOTLAND,**  
**RELATIVE TO**  
**CONVEYANCING AND LEGAL DILIGENCE.**

---

**By WALTER ROSS, Esq.**

**WRITER TO THE SIGNET.**

---

**THE SECOND EDITION.**

**TO WHICH IS ADDED**

**A DISCOURSE ON THE REMOVING OF TENANTS,**

**AND**

**A GENERAL INDEX.**

---

**IN TWO VOLUMES.**

---

**VOL. I.**

---

**EDINBURGH :**

**PRINTED FOR BELL & BRADFUTE.**

---

**1822.**





TO THE RIGHT HONOURABLE  
I L A Y C A M P B E L L,  
OF SUCCOTH,  
LORD PRESIDENT OF THE COURT OF SESSION,  
  
THE FOLLOWING SHEETS ARE,  
  
WITH THE GREATEST RESPECT,  
  
INSCRIBED,  
  
BY  
  
HIS LORDSHIP'S MUCH OBLIGED,  
  
AND MOST OBEDIENT,  
  
HUMBLE SERVANT,  
  
THE EDITOR.



---

## ADVERTISEMENT.

---

**T**HESE prelections were delivered by Mr Rofs, to a numerous body of the Gentlemen of the law, who attended the private class which he taught in Edinburgh during the years 1783 and 1784. The ‘ *Address to the Members of the College of Justice,*’ published by the Author previous to opening the class, and now prefixed to this volume, will explain the nature of the plan, the reasons of the particular arrangement of the subjects, and the mode of investigation adopted in the prosecution of the undertaking.

It is much to be regretted, that a new line of business, in which Mr Rofs found himself unexpectedly engaged, and which required almost constant attendance in another country, withdrew his attention from his favourite study, and prevented him from completing the plan he had in view. Had he been allowed to put a finishing hand to the work, it would no doubt have appeared in a different shape, and have been productive of more honour to himself, and of greater benefit to society.

The following Lectures, however, being complete in themselves, in consequence of the Author’s method of treating each subject separately, without any connection with, or relation to another, led the Editor to entertain the idea, that the publication of them would be of considerable public utility. But, being unwilling to hazard the reputation of the Author, he judged it proper, before putting the work to the press,



to submit it to the perusal of two Gentlemen of the Law, of distinguished knowledge and abilities; and with their approbation he now offers it to the Public.—In doing so, he wishes that these volumes should be considered rather as consisting of so many *practical essays*, or *law tracts*, than as being a complete course of Lectures, of which, indeed, they were intended to be only a part.

The Editor returns his grateful thanks to the Gentlemen who so kindly took the trouble of revising the manuscript. Without their assistance, he never should have ventured to give the present work to the world.

It is hoped, that the Reader will excuse any small inaccuracies in the work, which are unavoidable, especially in a posthumous publication.

EDINBURGH, }  
1<sup>st</sup> January 1792. }

CONTENTS

# CONTENTS OF VOLUME I.

---

	Page
<i>Personal or Moveable Bond</i>	1
<i>Clause of Registration</i>	92
<i>Testing Clause</i>	121
<i>Bond of Relief</i>	161
<i>Assignment and Translation</i>	176
<i>Discharge</i>	212
<i>Discharge and Assignment</i>	221
<i>History of Personal Diligence</i>	234
<i>Style of the Letters of Horning</i>	280
<i>Caption</i>	312
<i>Liberation</i>	346
<i>Act of Grace</i>	348
<i>Bond of Presentation</i>	353
<i>Suspension</i>	360
<i>Poinding</i>	385
<i>Letters of Open Doors</i>	443
<i>Arrestment</i>	449
<i>Inhibition</i>	459

TO





TO THE

M E M B E R S

OF THE

COLLEGE OF JUSTICE.

---

THE Education which the Youth of this country, destined to the profession of the Law, usually receive, is insufficient to qualify them for the immediate practice of it, either at the Bar, or even in the inferior departments of the science. The young Lawyer is astonished at discovering how little his abstract studies have fitted him for practice. He comes, perhaps, to argue upon *Deeds*, the parts of which he has never considered with attention; and to conduct himself by *Forms of Court*, till then almost unheard of: Consequently, in the moment of debate, of expansion of mind, he hesitates, and feels himself the echo of the Agent \*. The Writer is sensible

\* Sir George M'Kenzie's characters of the Lawyers, his cotemporaries, are drawn with a Master's hand.—The effect of the disadvantage here pointed out is finely marked in one of these portraits:—*Cunninghamus* natura disertus, et lucubrationibus doctus; dotes suas continuata per multos annos cum his disputatione mire auxerat. *Ab initio chartulas etiam neglectissimas omniaque facti ramenta perscrutando, clientibus potius quam famae se accommodaverat, nec in arguendo ea quae juris erant sibi in suis orationibus*

fenfible of an embarrassment no lefs discouraging, upon quitting the Office of his Mafter. The time of an apprenticeship is not always employed as it fhould be; nor are the opportunities of instruction which that period affords fufficient to fit him for the exercife of his profeflion. He trembles at the thoughts of trufting to his own ftrength; and goes on, like a man in the dark, doubtful, timid, and groping every inch of his way. Knowledge is then to be picked up by experience, by accident; and the practitioner's hairs often begin to change colour before he acquires that confidence in himfelf, that eafe in the execution of bufinefs, which is indifpenfibly neceffary to the happinefs of his life.

There are many, however, whole opportunities of information have been great, and who have properly improved them. There are men of natural ability, who quickly furmount all difadvantages, and reach the fummit of their profeflion againft every defect of education: At the fame time, there is *no man* of bufinefs who is not more or lefs affected by the circumftances I have mentioned. If Forms have not been ftudied by a young Lawyer in a comprehensive manner, he muft, in the courfe of his practice, meet with new ones, which will, for a little, flop his progrefs. However varied and extenfive the bufinefs of fome Writers may be, there are branches of Practice which never (or at great intervals) appear in their Offices. The employment of *one*, is chiefly *conveyancing*—that of another, *agenting*—money-matters, and the management of eftates, of a *third*; fo that the apprentice has not an opportunity of learning a great part of what he ought to know.

The bad confequences of this want appear from the methods which have been attempted to fupply it. In the beginning of the  
 prefent

‘bus indulfit, donec hos per plures annos difputantes audiverat, invidiamque ita prudenter vitavit, donec eam fuperaverat.—*Tandem tamen vere maturus fuaviter doctusque oravit, et exiftimationem, quam alii audacia rapiunt, ille modestia fua fibi conciliavit.*’

present century, an apprenticeship in a Writing-chamber was deemed an indispensable part of the education of a young Lawyer; and, even in later times, several of these Gentlemen have dedicated a part of their time to attendance at the Offices of well employed Writers. But the slowness, the want of variety, the partial manner in which business there shewed itself, soon disgusted them. They perceived, that sufficient time could not be spared for imbibing knowledge in that broken manner. 'The evident want (says Sir William Blackstone) of some assistance in the rudiments of legal knowledge, has given birth to a practice, which, if ever it had grown general, must have proved of extremely pernicious consequences: I mean the custom to drop all liberal education, as of no use to the Students of Law; but to place them, in its stead, at the desk of some skilful Attorney, in order to initiate them early in all the depths of Practice.' He is here successfully pleading the cause of university education, of the then novel Vinerian establishment at Oxford: But, with the most profound deference to that learned Professor, it may be averred, that if a Lawyer could be initiated in Practice, without dropping his liberal studies, it would be the most compleat education he could receive.

So far from banishing liberality of accomplishments, even from the second branch of the profession, the Writers to the Signet have been careful to ensure a classical and genteel education for their Members; and, by late regulations, none are admitted to serve apprenticeships who have not received it.

Conscious of the defects of chamber-education, and how little pains their more advanced clerks take in instructing apprentices, several of these Gentlemen, of distinguished abilities, have, at different periods, determined to dedicate some time to lecturing upon the several branches of their business, which they wished to impart to the Youth under their care, in a regular method. I have no doubt that

these good endeavours have been attended with the best consequences; but the interruption of real business could not fail to distract the attention, and break in upon the plan. Having often, in the midst of practice, amused myself, by tracing the origin, the principles, and the progress of particular parts of our Forms, I insensibly contracted an inclination to the study, and felt a wish for leisure to prosecute it. This inclination came at last to be gratified, in a manner little enviable. Residence in the town became incompatible with health. In this situation, the thought of the present undertaking presented itself: And though the small distance to which I had retired proved unsuitable to practice, it appeared to be no obstacle to an employment which required a regular attendance. I reflected, that other professions, Medicine in particular, were furnished with separate instructors in all their branches, which rendered the education of Students scientifically complete; that the Practice of the Law was communicable by the same method as the Theory of that science; that, in Medicine, the Professor must wait till Nature produce the disease, or Accident the fracture, upon which his Clinical Lecture is to be given; and, consequently, the order of instruction must wait upon Nature and Accident;—whereas, in the Practice of Law, all the Forms are at hand, ready to be exhibited, arranged, and combined at pleasure. Thus, by degrees, I was led to think, that I could not employ my time with more advantage to my profession, or more pleasure to myself, than by dedicating it to the study of the Practical Part of the Law of Scotland, and to the instruction of young Gentlemen, destined either to the Bar, the Writing chamber, or other branches of the profession \*.

There

\* In the Seminary of Jurisprudence at Paris, there are a certain number of Teachers conjoined (or *aggregated* as the French term it) to the Faculty of Advocates, whose province it is to give public and domestic lectures upon the laws—to smooth the entry of the study of them to beginners—to prepare the students for the examinations they are to undergo—to certify their abilities previous to their admission to trial, and to assist at the examinations.

LE GRAND ENCYCLOP. v. *Aggrégé*.

There was a time, it is said, when Conveyancers and Formalists in Scotland possessed a degree of learning and information, in which they acknowledged no superiors—when Styles were considered as the foundation of the fabric of our Law.

In the days of Sir John Fortescue, the Students of the Law of England set out in their progress from this goal.—‘ The Students in the Inns of Court (says he) are for the most part young men: Here they study the nature of original and judicial Writs, which are the first Principles of the Law.’—Without a thorough understanding of the Forms of Writs, it was Lord Coke’s opinion, that a knowledge of the Law is not to be attained.

Styles, as the unerring records of our jurisprudence, were of the greatest authority with our forefathers.—‘ Arguments brought from Style (says Sir George M’Kenzie \*) are a great part of our fundamental law.—They, to Lawyers, are, what the *Chart* is to Geographers, or the *Compass* to Seamen.’—And, in another place, speaking of the Forms of Gifts, he asserts, that Styles were, by our practice, observed as *Statutes*.—‘ It is well known (says the Hon. D. Barrington †; that there is no legal argument which hath such force in our Courts of Law, as those which are drawn from the *words of Antient Deeds*; and that the *Registrum Brevium* is therefore looked upon to be the very foundation of the Common Law.’

It is a trite, but just remark, that the value and rank of every art and science, is in proportion to the mental powers employed, or the mental pleasure created by it. The Conveyancer, the Formalist, the Writer, are inferior to the Barrister.—His employment is wholly liberal—their’s is partly mechanical; and the more they deviate from the

\* Observations on the 42d Act of James VI.

† Observations on Antient Statutes, p. 111.

the employment of the mind, the lower they sink in esteem.—Hence that gradation from the intelligent respectable man of business, to the practitioner in those inferior parts, in the execution of which *all are upon a level.*

There are many of my Brethren in station, whose knowledge and abilities would insure a very different success to an undertaking of this kind; but they are too deeply engaged in the duties of their profession.—Were any of these Gentlemen proposing to employ their time in this manner, it is needless to declare that I would not attempt it. I can say nothing for myself, but that I am fond of the study. My situation enables me to dedicate my time entirely to the undertaking. Inclination and industry, therefore, must be offered, in place of all other qualities.

‘The Styles, in former times, (says Mr Dallas of St Martin \*) were good and formal; yet, not being digested in method, required a long time, and great experience and employment, before Youth attained to perfection in the art of writing to the Signet, and diving into the knowledge of Securities.’ To shorten the road, he collected and published a *System*, for which his profession has been infinitely indebted to him; but the oldest Members may recollect, how their hearts *failed within them*; with what disgust they turned away, when presented, in the Writing-office, with such a frightful volume of arid, naked, unintelligible Forms. A considerable time passed before they could be brought to think of Styles or Forms of any kind, but as masses of impenetrable dulness.—What adds to this early aversion is, that our Writs have not always followed the changes of the Law: They are often replete with customs, rules, and terms, the vestiges of which are no-where else to be seen. Before a person can understand what *now is*, he must go back to what *has been*.—Styles and  
Forms

\* Preface.

**Forms cannot, therefore, be comprehended, without some acquaintance with antient customs, manners, and history both civil and ecclesiastical. How can a competent knowledge of the Civil Law be attained, without the aid of Roman history and antiquities?—By a liberal distribution of national facts, events, and remains of former times—by a judicious application of general principles, and a familiar exposition of technical terms—Professors Blackstone and Sullivan have drawn aside the sable curtain which covered the mysteries of the Law of England, and given a lasting value to their own works.—‘*Nondum satis statuere potui (says a Civilian) plusne juris historia ex jurisprudentiæ libris, an jurisprudentia ex historicis monumentis accipiat.*’**

The study of the Law is often said to be hedged round with the brambles and thorns of writs, precedents, and authorities. Discouraged and dejected, the young mind, therefore, needs every allure-ment to fix its attention, and every assistance to encourage its perseverance in a path so little suited to its wishes. What then shall be said of the thorns and brambles themselves?—Even these rough plants bear not unpleasing flowers.—‘*Law (says Lord Kaimes) becomes only a rational study, when it is traced historically. And yet Law is seldom conducted in this manner: It is taught as a collection of facts; the memory is employed, seldom the judgment. Were it otherwise treated, in place of a dry, intricate, and crabbed science, it becomes an entertaining study.*’—I shall take the liberty of applying his Lordship’s idea to the inferior department,—to the practice of the Law. Let this branch likewise be treated historically. Let every part of it be traced from its origin. Let illustration be borrowed from Law—from history—from antiquity—from manners. No science will refuse its aid to embellish the rugged path.—If a youth has received a liberal education, why should the business of his life be taught him in a manner adverse to every thing he has read or heard? Why should imagination be darkened, and every agreeable

agreeable idea banished from his study? Would it not be better to give him some employment for his acquirements, to excite his recollection by historical allusions, to awaken his attention by pictures of ancient manners, and to surprise him now and then with a flower of the Belles Lettres, amidst the brambles of his profession? Thus reason may be induced to take a share, where memory only would have been employed; and memory may become, not an *index* of sterile facts, but, as it always ought to be, a storehouse to the judgment. Is it not a shame to see people, during the whole course of their lives, writing words, nay whole clauses of Deeds, they do not understand; and going gravely, like horses in a mill, the round of Forms, without knowing one iota of their origin, their progress, or even their present importance? The only reason they have to give for doing any thing is, that it has been done before. The least deviation, then, from practice, confounds and distracts them.

To the ignorant in their profession, business is a game at chance, where the odds are against the player. To the knowing, it is a science where success will be due to conduct; not to fortunate hits, or unexpected advantages.—I might say a great deal upon this subject; but it is unnecessary: The defect of the education I have pointed out, is universally felt and acknowledged. I can mark out the disease much better than prescribe the cure, which shall notwithstanding be attempted.

If the origin and progress of our Law and Forms stood any-where discovered; if every word to be found in them were explained, reduced to its legal import, and its proper etymon; if every branch of Practice had been illustrated by particular treatises, as in England; then I should have had little to do, but to arrange, methodise, and collect materials scattered in volumes, and to render them palatable to the minds of beginners:—But I have no such assistance. Our Antiquaries, though not behind their Brethren in acuteness or diligence,



gence, have expended their researches upon points of mere curiosity, or of national dispute. We have no history proper to our Law, but some loose unconnected hints, thrown out by Sir Thomas Craig, and Lord Stair. We have no glossary, but Skene's little Tract; no explanation of our Statutes, but the hurried, superficial Remarks of Sir George M'Kenzie \*; and not a word relating to our Forms or Practice, but what is owing to the learning and ingenuity of Lord Kaims. 'As to our Law-books, or Systems, what are they (says his Lordship) but a mass of naked propositions, drawn chiefly from the decisions of our Supreme Courts, rarely connected either with premisses or consequences?'

Sir George M'Kenzie displayed high abilities, heightened by a wonderful industry, considering the bustle of his public life. He, it appears, became sensible of the very defect which is the object of this address, and had actually begun to supply it.—In the Preface to his Treatise of Heraldry, the following paragraph is to be found:—  
'Having designed to learn from our old rights and evidents, the origin and progress of our Styles, and by what steps they arrived at their present perfection, (in which work I have made considerable progress); but because I want time to fit it to the Press, I resolve to leave the MS. as a new testimony of my kindness to my native country.'—This, in all probability, would have been a performance replete with information; but it seems the subject did not appear important enough to those who had the care of that Gentleman's papers. The Treatise is not printed, and the MS. not to be found. In Mr Spottiswood's † Notes upon Hope's Minor Practicks, mention

is

\* I was at first informed, that the public were to be favoured with a learned illustration of the Scottish Statutes, from the accession of James I. to the accession of James VI. by Lord Hailes; but I have since learned with regret, that various obstacles have prevented his Lordship's design from being put in execution.

† Professor of Scots Law, in the 1715.

is made of a *Scots Law Lexicon*, and a *Special History* of the Law of Scotland, as both written by that Author: And, in the preface to his Styles, he promises an *analitical*, and what he is pleased to term a *nomological* method of illustrating Writs, for the use of Youth. But none of these books have ever appeared in public: So that I have all my materials, as well as the arrangement of them, to think of, and prepare.

The plan I have laid down, has for its principal object *the education of a Man of Business*; and, in point of method, I have been directed by no other rule than that of *practice*.—I have endeavoured to render my Prelections subservient to the education of the Writing-Chamber, and to the line of daily business. I wish to accompany the young Writer, during the time of his apprenticeship, to analyse the Deeds he sees passing under his eye; and to give an account of their origin, their progress, their principles, and their effects; to explain the different terms he meets with; and to trace actual business, in all its steps, from the beginning to the end of every branch.—I have revolved many methods of executing this undertaking; and, after all, I am obliged to determine upon treating each deed, and each branch of business, *separately*; taking it up as it occurs or grows out of preceding transactions, and pursuing it as far as it will go.

It has been suggested by several respectable Gentlemen of the Bar, that the best plan would be, to follow the order of Mr Erskine's Large Institute, *i. e.* to give the several Styles and Forms as they there arise; by which my work would become a Practical Supplement to that received System, and at the same time prove subservient to the Prelections of the Professor of Municipal Law.

The idea was extremely natural to Lawyers, who, from the Institutes of Justinian downwards, have constantly studied in the imperial order

order of persons, things, and actions. But I will hazard the assertion, that, however the Institutional Order may best comprehend the *Theory* of the Law, it is by no means suited to the *Practice*, or the purposes of Practitioners; and it is a chief part of my proposal to break through this Roman wall, and to range at large in the direction of our own customs, rules, and business.

Dallas of St Martin experienced the substantial use of a different arrangement; and, accordingly, the first part of his *Styles*, intituled, *Real and Personal Diligence*, begins with a Moveable bond, and pursues it in the actual tract of business (in the Author's time) till it becomes an heritable security upon the debtor's land, by apprising and adjudication.—I appeal to all my Brethren of practical knowledge, if this first part of St Martin has not proved of more real service, than all that has been written or said upon the subject. Men of business, then, will understand me, when I declare that I am to treat every branch of my subject *in this order*. When the subject changes its nature, I will follow that change, and speak to every article as it must occur in the course of business. Subjects that will not enter into this arrangement, such as the Histories of Courts, Offices, and Particular Customs, I will treat by themselves: Others may be capable of being introduced in an episodical manner.

The impropriety of the other method must forcibly strike any person who will take the trouble of consulting *a list of Styles*, said to have been made up in the order of M'Kenzie's Institutions, by Mr Hay of Carribber, and published by Spottiswood, to remedy, as he tells us, the *want of order observable in Chamber Style-books* \*.—If his own Book of Forms is looked into, the arrangement appears a great deal worse. Deeds belonging to branches of business distinct and irreconcilable, are there classed together, for no other reason

c. 2

than

\* Spottiswood's *Styles*, 2d edit.

than that they happen to go under a common or general title, such as *Bonds*; and to rank under some Roman division, such as *Obligations*.—These writs are never found to be consecutive in practice; nor have they any connection or dependence upon each other; whereas, in the method proposed, each Deed grows, as it were, out of the preceding one—a circumstance sufficient to decide in its favour.

Theorists, with great propriety, class all the subjects of Law under general titles, in order to regulate them by the broad principles and maxims of the science. With them, Marriage, Decrets of Forthcoming, Confirmations, &c. are all *Assignations*. Practitioners must consider these matters as quite distinct from each other; and, in place of referring particulars to general rules, they must be content with the humbler province of breaking these general rules into *particular cases* \*.

As the arrangement of the subject is to follow the order of practice, so the method of information is to wait upon the simple order of time.—For example, I am to begin at the earliest Law or Custom relating to any one subject. This is to be traced to the first Statute made in that behalf: The Statute is to be annalised, and the variations and improvements introduced by it explained.—Next follows the practice upon that Statute, *i. e.* the extension, restriction, or literal application of it, to be found in the Decisions of our Supreme Court. The defects or evils yet remaining or arising from change of manners, or civil alterations, lead to the next Act of Parliament, or of Sederunt; and so downwards to the present times. This done,  
the

\* In the Linnean system, the most diminutive plants are arranged with those of the largest size, because they agree in the number of the stamina of their flowers.—Knowledge in this mode of classing makes the Modern Botanist; but, of itself, it would never make a *Gardener*. The cultivation, progress, and useful distinctions of individuals in the vegetable tribe, must be the subject of his attention and labour.

the oldest Form of the Deed which is the subject of examination is to be analysed, and the relation of its parts to these progressive Laws pointed out, till the comparison terminates in the Writs now under the eye. During this historical course, every antiquated term or custom alluded to, is proposed to be explained. And thus, I flatter myself, knowledge necessary to business may be communicated by an agreeable speculation, where the mind is kept in a constant progress from truth to truth, and from discovery to discovery, almost in the close relation of cause and effect.

My principal care must be, to impress upon the mind, with the greatest precision possible, the *present rule and practice in every case*. Sometimes to encourage the free exercise of thought, I propose to indulge that sceptical inclination upon legal topics, so much applauded by Lord Kaimes. The frequent mistakes, defects, and weaknesses of our authorities, discovered in the course of examination, sufficiently prepare the mind for an amusement so conducive to the enlargement of its faculties. Opinions have been often compared to *light gold* taken without weighing—sometimes to *counters* taken in a hurry; but it is by the use of the scales, and the practised eye, we are to discover the want, or the adulteration. If Students could be induced to think, and to reason with freedom upon these subjects, the young Lawyer would imbibe the very soul of his profession, and the Writer attain to a sovereignty over those rules of practice, which for a long time embarrass and restrain him.

I mean to quote authorities for whatever I advance, or reason from: I am sensible it becomes my knowledge, my experience, and situation in life; none of which entitle me to speak upon my own credit. I wish young gentlemen to examine, and to think for themselves. In place, likewise, of making the ideas or reasonings of authors appear to be my own, I intend to give their own thoughts always in their own words, except when they have written in another language;

guage; and in that case I shall, to accommodate every person, translate as close to the original as I am able.

One branch of my undertaking remains to be spoken of; that is, an endeavour to accompany our own Forms, with an idea of those of England, in the same cases. To say the truth, I found the inquiry indispensibly requisite to the understanding of our own Styles and Forms. What Lord Kaimes affirms of the Law, may, with equal truth, be applied to a very great part of the Practice.—‘ In both nations it has such a resemblance, as to bear a comparison almost in every branch; and it only so far differs, as to illustrate by opposition \*.’

And now it is but justice to confess, that the plan I have imagined will not be completed to my own satisfaction for some years. If my first attempt is approved, I can promise no more than to work upon the design with unwearied diligence.—In regard to the language, nothing correct or elegant is to be expected from a man who has laboured more than twenty years in the exercise of his profession, and admitted all the corruptions of it into his style. If I sin not in being obscure, the impropriety of expression, or the barbarisms, will only recoil upon myself.

\* Lord Coke observed a wonderful conformity, not only between the great lines of the constitutions of both kingdoms, but also in their *writs*, their *customs*, and even the language of their jurisprudence; and thence concludes, that the common law and practice of each has been originally the same. 4. *Inst.* p. 345.

‘ I have (says the Hon. D. Barrington, p. 111.) compared the Writs of Nouvelle Diffesin with that ancient book in the Scots Law, intituled, *Quotiam Attachiamenta*. The comparison of these Writs seems fully to prove, that the Law of Scotland agreed anciently, not only with the principles of the Law of England, but with *its Practice*, though there might be some variances of no great importance.’

# E R R A T A.

- Page 74. line 20. for *bond* read *benefit*  
— 125. — 21. for *fili* read *fili*  
— 169. — 5. for *debtor* read *creditor*  
— 184. — 29. for *intimation* read *assignation*  
— 246. — 7. for *confistata* read *confistat*  
— 283. — 31. for *James VI.* read *James I.*  
— 390. — 24. *dele* charter  
— 446. — 4. for *1649* read *1469*





---

---

L E C T U R E S

ON THE

P R A C T I C E

OF THE

LAW OF SCOTLAND.

---

*The Personal or Moveable Bond.*

**I**N an advertisement formerly published, upon the subject of the Lectures which you are now to do me the honour of attending, I mentioned, that the arrangement of the matter was to be directed according to the line of practice; and the method of information to wait upon the simple order of time.

Without attending, therefore, to the rules, which a systematic theory might dictate, I am to endeavour to render my prelections subservient to the education of the writing office; and to the line of the business in which you are to be employed, during the remain-

der of the day. For this reason I have (after the example of Mr Dallas of St Martin) chosen to begin with the history, and the analysis of a simple moveable bond for borrowed money; and, in this first part of the course, to follow it in the tract of our present business, through the variety of its effects, first in personal and then in real diligence. At the same time, I must notice, that though the common bond be always first presented to young gentlemen upon their entry to business, and although for these one hundred and fifty years, the custom has been to place it in the front of every private collection of forms; yet, were the history of our files to be given in the order of time, the moveable bond, however simple and brief it now seems to be, would appear in the last rank of our deeds.

According, therefore, to the order of history, I should lay before you the whole body of real or heritable securities, before speaking of the moveable bond, because the first and most ancient securities for money were taken by mortgage,—by wadset,—by reserved rents,—by annualrent rights, and other real devices; in comparison with which, both our heritable and moveable bonds are but the productions of yesterday. Though this would be found to be the order of time, the order of practice is entirely different. By practice we every day learn, that the personal bond, for the most part, forms the basis of our securities, and of our executions real and personal.

It is natural, therefore, that the bond should be the first deed which is explained to a young conveyancer; and, accordingly, it is the first writing which he is generally entrusted to put upon paper; a circumstance which determined my choice, as it did that of Mr Dallas of St Martin, who in one sense may be called the Father of our Scottish forms.

In treating of my subject, I pretend not to teach law; I am to make use of that science, so far as may be necessary to establish the principles, to deduce the history, and explain the tenor of the writings, judicial and extra-judicial, which are the subjects of our employment.

ployment. No information, therefore, which I am able to promise you, will encourage any individual to slacken his studies of the Roman or Scottish law, as scientifically taught by their learned Professors. My province is to teach you, what my brethren the Writers would teach the gentlemen committed to their care, if the other duties of their profession could possibly admit of it. In order that you may be able to profit by practice under them, the study of the law as a system, has long been recommended, and even enforced by regulations. In place of teaching the law, I borrow it only at times for the illustration of particular points of practice. Lawyers have long used writs and forms to illustrate the law. This is indispensibly necessary. I am now to make a humble effort to illustrate the writs and forms by the law. The first method has solely in view the gentlemen destined to the bar.—The other is directed to the students of our national jurisprudence in general, and to Writers and practitioners in particular. From me you are to have only the information proper to your employment, culled from every source where I have been able to find it. Upon the Professors, and your own private studies, you are to depend for that scientific knowledge, and comprehensive view, of the laws, which form the accomplishment of members of the College of Justice.

There is one inconvenience attending the broken method which I am under the necessity of adopting. The principles, and sometimes the history, of one deed or part, of practice, will apply to, and account for several others. I am also often casually to touch upon matters intended to be treated of in another place; hence I shall sometimes be involved in repetition and prolixity. These, however, are but a small part of the faults, for which I will have occasion to pray your indulgence.—If I am not able to shew you the road to truth, I flatter myself with the prospect of preventing your industry from being misapplied. When I reflect upon the labour I have bestowed, I cannot help entertaining some hopes of success; but when, on the other hand, I look to the

extent of the undertaking, and to myself, the result of my application shrinks almost to nothing.

When our systematic writers on the law touch upon any of the singularities in the form of deeds, they have a short account of the matter at hand ; they tell us, that this or that was done, or so conceived, in order to avoid the prohibition of usury, or taking a profit for the loan of money, which was contrary to the laws of the church. The general position is so true, that to the devices fallen upon to defeat those laws, the greatest part of the deeds now in use, both in England and Scotland, owe their original forms. The notice thus taken of a cause which lasted through ages,—which had effects so strange,—so lasting ; is a great deal too slight and unsatisfactory to the inquisitive mind. We wish to examine this prominent feature in the history of the law ; to know something of the origin and nature of these prejudices ; and to trace them in their progress and effects upon the practice of our forefathers. For these reasons, gentlemen, I have chosen to introduce my account even of personal deeds, and of the bond in particular, with a circumstantial detail upon the subject of ancient usury. When we arrive at our own country, and within the ken, if I may use the word, of our own laws and statutes, we shall find, that the history and principle of the common bond is nothing but a small branch of this great tree, which could not with propriety be detached from it.

Money is by its nature a barren commodity ; it does not, like land or cattle, afford any increase to the possessor. When one man hires out properties of the last kind to another, they produce an evident gain, which is more or less according to his own care and industry ; the lender, therefore, at all times, thought himself entitled to a certain share of this profit, in consideration of the loan.

It is by commerce alone, that the holder of money can procure increase to the stock ; and, therefore, it is only in commercial countries that people borrow money of one another, with a view to advantage. In countries that are not commercial, the only motive for  
borrowing

borrowing must be the supply of some immediate necessity ; and, therefore, several nations among the ancients looked upon the taxing of that necessity as a moral evil, a demand dictated by cruelty and oppression ; for which reason they reprobated the practice, and held in abhorrence the persons who followed it.

The Egyptians were a commercial nation ; usury of consequence was known and permitted among them. The Israelites, by their residence in Egypt, became also well acquainted with it ; and, perhaps, had suffered from the consequences. Whether from this reason, or that their Legislator judged the practice unsuitable to the situation of his people, upon their departure from that country, is not known ; but we certainly know, that there is no evil more directly proscribed in the Judaical law.—‘ Thou shalt not (says Moses) lend  
‘ upon usury to thy brother, usury of money, usury of victuals,  
‘ usury of any thing that is lent upon usury : Unto a stranger thou  
‘ mayest lend upon usury ; but unto thy brother thou shalt not \*.’

Whatever respect has been paid by the Chosen People to the first part of this law, certain it is, that no precept given by the inspired Legislator has had such perfect obedience paid to it, as this last. Upon strangers, the Jews had never any mercy in their exactions, which entailed upon them the hatred of ancient nations ; and, in modern times, the injury came to be dreadfully retaliated almost in every country in Europe.

Many writers have taken much ingenious pains to justify this exception in the law of Moses, but their arguments do not concern the present subject ; in general, they are drawn from the horror in which this people were taught to look upon the nations around them. With regard to their own people, the Jews continued, if not in the observance, at least in veneration of the precept. Nay, usury appears to have been ranked among crimes of the deepest dye.  
‘ He hath oppressed the poor and the needy, hath spoiled by  
‘ violence, hath not restored the pledge, hath lifted up his eyes to  
‘ the

\* Deut. chap. xxiii. ver. 19. 20.

‘ the idols, hath committed abomination, hath given furth upon  
 ‘ usury ; and shall he then live ? he shall not live ; he hath done all  
 ‘ those abominations, he shall surely die ; his blood shall be upon  
 ‘ him \*.’

In the New Testament, the idea of a loan is carried to perfection, and usury is prohibited without any national distinction. ‘ There is  
 ‘ no difference (says St. Paul) between the Jew and the Greek, for  
 ‘ the same is Lord over all †. If you lend to them, of whom you  
 ‘ hope to receive, what thank have you ? for sinners also lend to  
 ‘ sinners, to receive as much again ; but lend ye, hoping for nothing  
 ‘ again, and your reward shall be great ‡.’

In the first ages of the Roman Commonwealth, usury was discharged ; it suited not the manners of a plain and warlike people. When these manners changed, it came to be allowed ; and, when allowed, produced many evils and seditions in the commonwealth : ‘ Sed vetus urbi foenebre malum et seditionum discordiarumque creberrima causa.’ Many laws were made to obviate the fraud committed by usurers, which were as often defeated ; and usury arose again by wonderful arts. ‘ Multisque plebiscitis  
 ‘ (says Tacitus) obvium itum fraudibus, quae toties repressae miras  
 ‘ per artes rursus oriebantur §.’

Although usury came at last to be authorised by the Roman law, under restrictions, it was still looked upon as a pernicious crime : ‘ Cicero mentions, that Cato being asked, what he thought of  
 ‘ usury ? made no other answer to the question, than by asking the  
 ‘ person who spoke to him, what he thought of murder || ?’ As the Romans increased in power, riches, and luxury, the necessities of part of the people increased ; and experience demonstrated the propriety of allowing a profit to be taken, in order to encourage the money holders to throw their cash into the circle ; and, on the other  
 hand,

\* Ezek. chap. xviii. ver. 12. 13.

† Luke chap. vi. ver. 34. 35.

|| Cicero lib. ii. de officiis in fine.

‡ Rom. chap. x. ver. 12.

§ Tacitus annal. 6. Ann. Urb. 786.

hand, to prevent the oppression of the people, by too severe a tax upon their necessities. A variety of laws, therefore, were made to limit the profit, or fruit, as it may be termed, of money, and to defeat the rapacity of lenders. The ingenuity, however, of the latter class appears to have been always superior to the laws; and hence the gain, squeezed from the necessitous above the legal rate, came to be termed usury, and the receivers of it usurers.

The word *usura* signifies originally nothing more than the use or enjoyment of any thing; Cicero thus expresses himself: '*Natura dedit usuram vitae tanquam pecuniae.*' Since it has been applied to illegal exactions, the term has continued in an odious acceptance.

From the writers of the Augustan age, we learn that this matter had not at that time been brought under sufficient regulations. If the description which Horace gives of his usurer in the Satires, is to be credited, the practices of the money lenders were execrable beyond belief\*.

The principal sum is expressed by the word *caput*, from whence we have our *principal* or *capital* sum; *merces* is the interest, or the reward which Fufidius draws from it; and the deduction of the interest *per* advance, is happily conveyed by the verb *exsecare* to cut out; because it was taken out of the principal before lending. Among the Romans, interest was always counted by the month. Horace's usurer then lent one hundred pounds for a month, at the expiration of which he became entitled to one hundred and five; but to make sure work, he advanced only ninety five, and took from the debtor an obligation for one hundred, which turns out to 60 *per cent. per annum*, in round numbers; besides the retention and

\* Fufidius vappæ famam timet ac nebulonis,  
Dives agris, dives positus in foenere nummis.  
Quinas hic capiti mercedes exsecat; atque  
Quanto perditior quisque est, tanto acrius urget.

HOR. lib. i. Sat. 2.

and its intermediate profits. We need not wonder then that usury was held in abhorrence among this great people. The law, however, continued to authorise a legal interest, which varied at different periods, according to the plenty or want of money, and the demands of the people.

Upon the conversion of the Empire to Christianity, the religious doubts arising from the texts of Scripture, which you have heard, began to revive, and to exercise the minds of men, at that time prepared to receive and to convert every circumstance of life into a subject of disquisition. The Emperor Constantine allowed the exaction of interest at the rate of *1 per cent. per month*, termed *usura centesima*, and Justinian made several regulations concerning it; prescribing different rates to different ranks of the subject, allowing it upon contracts of certain denominations, and refusing it upon others. The dispute again arose among the Fathers of the Church, who agreed in condemnation of the practice, holding it up to the detestation of the Christian world, in stronger terms than Moses had done to the Israelites, and making little or no distinction between moderate interest and excessive usury.

A measure so impolitic, threw the commerce of money almost entirely into the hands of the Jews, who enriched themselves, and every where distressed the people. This effect, in place of pointing out the true and natural remedy to the evil, called down upon the practice of usury or interest in general, the condemnation of councils, the prohibition of the Popes, and the execrations of the churchmen all over Europe.

Impelled by reasons of this kind, the Emperor Basil, in the 9th century, without distinguishing between legal interest, and absolute extortion, abolished the practice, *in totum*, by Imperial authority. His son Leo soon found himself necessitated to recal this order: 'Matters (says he) have since the date of the late regulation turned 'a great deal worse, those who formerly lent with a view to gain, 'will lend no more.—Every thing is at a stand. Et in eos qui pecunias



‘*cunias indigent, difficiles atque immites sunt.*’ The Emperor, therefore, fixed the legal interest at a moderate rate, but the rule did not long continue in observance\*. The allowance made, it seems, did not prove adequate to the wants of the people, or the demands of the money lenders; the old evils revived,—the Jews still held the best part of the commerce in their own hands,—the churchmen continued to rail; and the practice of taking profit for money, without distinction, was at last solemnly condemned by the Canon law: ‘*Dare pecuniam mutuo (say the Canonists after St Thomas) non ideo est peccatum, quia est prohibitum; sed potius ideo est prohibitum, quia est secundum se peccatum; est enim contra justitiam naturalem.*’

From the mistaken doctrine thus canonically established, and promulgated over all Europe, and the impolitic measures which they dictated, we shall find the true reasons and principles which gave birth to the forms of the generality of private deeds and conveyances.

The effects of these universal prejudices entirely influenced, for a long period, the whole system of securities upon heritable property. The Church, after closing the door herself, soon found it necessary to point out a variety of methods, of handsomely evading the rigour of her own doctrines, by mortgages, annualrents, trusts, annuities, &c. With respect to personal deeds for money lent, the common evasions did not so well apply to them; and, therefore, the churchmen themselves dealt in realities; when they ventured to give a personal loan, it was always upon a pledge.

The lending then of money upon personal obligations, appeared to be an object not worth attention; it was very little practised among the body of the people, either in France or in England, in the first ages of their Monarchy; the few necessities of life were procured by barter, and loans of money were only given according to the original principles, *i. e.* to relieve the necessity of friends.

VOL. I.

B

While

\* Nov. Leon. 83.

While the clergy themselves were taking, and teaching others to take, the highest advantages in the management of land rights, they confined the ideas of usury entirely to the loan of money upon personal obligations, for the declared purpose of taking a profit: Upon this subject, the consciences of the people were kept in perpetual alarm, and their eyes in some measure shut to the very opposite system practised in the management of heritable property.

The personal debt is the only subject of the present discourse; and, therefore, I am now to connect the history of its form, with that of usury, as it appeared in this island.

In the Roman law, the writing similar to our bond went under the name of *obligatio*, i. e. a binding for some cause assigned; because every obligation contained a cause or reason for coming under it, which we term the cause of granting. 'Obligatio' (say the Civilians) is so called, 'ab obligando seu vinciendo;' and Justinian defines it to be 'juris vinculum quo necessitate adstringimur alicujus rei solvendae, secundum nostrae civitatis jura \*.'

The Roman lawyers distinguished obligations into a number of kinds, assigning to all of them different effects, and different actions. These distinctions serve rather to display the subtlety than the wisdom of the profession. Against each of these actions they furnished a set of established defences and exceptions, imagined with an equal degree of laborious refinement. The Roman law had been preserved in Italy, in Spain, and the southern provinces of France, notwithstanding all the revolutions of manners, and of people; but the study of it did not become universal, till after the accidental discovery of the Pandects, or the great body of the Roman law, about the middle of the 12th century, when schools for teaching it were established in Italy.

In.

\* Inst. lib. iii. tit. 14.

In these schools a revolution was preparing in the business of conveyancing, which it is necessary to describe, before entering upon the particular effects of usury in England.

Towards the beginning of the 13th century, the language and ideas of the Roman jurisprudence became visible in the style, and in the manner of all deeds upon the Continent, and even in this Island. Before that time, the style in general appears to have been laconic and simple, the clerks were equally frugal in their expressions, and in the materials they made use of; but, in going downwards, the style lengthens, a thousand precautions start out formerly unheard of, a thousand frauds which our forefathers had not a single idea of, seem all at once to have burst forth; and, if the manners of the times were to be taken from the works of the notaries and public conveyancers, any person would have good right to conclude, that one half of mankind had, in less than fifty years, learned more wickedness, than their fathers had done in the course of ages: At the same time, that the other half had as suddenly acquired wisdom, address, foresight, and ingenuity, to guard against and defeat the frauds of their neighbours. The Historian, who should make such a reflection, would commit a great mistake. No such revolution had happened, either in the affairs or minds of men. The churchmen, the lawyers, the notaries, and clerks, in most countries, had got hold of the Roman law, which presented them at once with the experience of ages, and with the wisdom and refinements of the lawyers of the governours of the world. Proud of this new acquisition, and fond of displaying it, these men filled their deeds with precautions against evils which were never intended,—with reservations, declarations, prohibitions, &c. the want of which never had been felt among their forefathers. So far from bestowing security, this new style only served to drown the meaning of parties in an endless redundancy of words. In place of preventing, it served for a long time to eternize disputes, by affording a

world of new materials for the inexhaustible lucubrations of the doctors of the laws.

In England, as in other places, the canon law prohibited the taking of interest, and was strictly obeyed. When people lent money it was only upon pledge, and no visible profit was got in return. The common law admitted the prohibition of the canons; and the clergy carried it so far, that absolution could not be given to the breakers of it, without special powers from Rome. The usurer was not only punished by the civil magistrate, but if, after the death of any person, it came to be discovered, that he had been guilty of usury, we have the authority of Lord Coke, and of the ancient historians to mention, that his goods and chattels were forfeited to the King; so says our *Rēgiam Majestatem*, ‘all the goods and  
‘ gear pertaining to an ocherer, whether he dies tested or untested,  
‘ pertains to the King.

‘ Among the rest of the King’s dittays, it uses to be enquired and  
‘ proven be threttie tua liellmen, lawfully sworn of neighbours, that  
‘ any man until the time of his decease used and exercised usury and  
‘ ocher.

‘ Whilk being proven in judgement, all the moveable gudes and  
‘ cattle, quhilks pertained to the usurer, quha deceased, shall be in-  
‘ brought to the Kingis use, in quhais possession ever they be  
‘ found \*.’

It is impossible that a people can have made any advance in the arts of life, without feeling the want of the commerce of money; and the only method by which that commerce can be established, is by the public toleration of taking a profit for it. Volumes have notwithstanding been written, and continue still to be written, against this practice. These writers totally evade the question, which is certainly a simple one; for if profit can be made of money, either by commerce, or in any other shape, it is evident, that the proprietor of the money is entitled to a reasonable share of it. He who  
buys.

\* *Reg. Maj. lib. ii. c. 54.*

buys land and lets it out to rent,—he who buys cattle and sells their produce,—what is he doing but making profit of his money? Yet in Spain, at this moment, the taking profit for the loan of money is highly punishable; and even in France, the avowed bargain for interest is not legal among private individuals, though tolerated in the case of some trading companies; as the Farmers General, and the East India Company, &c. It is long since the spirit of commerce in Great Britain triumphed over it; but that was not till after an obstinate and various struggle, the detail of which will be a matter equally curious and instructive.

The canonical prohibition against the taking of interest threw, as I have said, the valuable commerce of money all over Europe into the hands of the Jews; that people made it a point of their religion to improve this opportunity to the utmost. Their legislator having allowed them to take usury from strangers, they bent their whole attention to the business; and monopolized both the trade and the materials of it. They possessed a great part of the ready cash, and became versant in all the arts of turning it to account. This traffic in England, it seems, prospered exceedingly, and attracted a number of the Jews from the Continent, who settled in the several towns during the reigns of William the Conqueror, and his sons. Towards the beginning of the thirteenth century, and in the reign of Henry III. the historians astonish us at the height to which the Jews carried their usurious extortions; the opulence to which they had arisen; and the horrid oppressions committed against them by the crown. At that time, they were, it seems, admitted to receive mortgages upon real property, as is evident from many of the deeds relating to these transactions, which are yet preserved. Their principal branch, however, consisted in taking pawns; and, being free of all restraints either from law, or from conscience, they did not scruple to exact 50 *per cent.*; nay, in the case of the Oxford Scholars, it required even

a royal mandate to limit them to that usury. This curious mandate was issued in the 9th year of Henry III.

‘ Judei Oxon. non recipient a Scholaribus pro libra in septimana nisi duos denarios, et similiter fiat in minore summa, secundum suam quantitatem, alioquin praedicti Judei puniantur, juxta constitutionem regni.’ It appears, that, by these means, the Jews at last got hold of all the books belonging to the Scholars, who were obliged to apply to Edward I. for relief.

On the other hand, the whole Jews, their families, and their property, were considered to be at the pleasure of the King; and Henry III. certainly made them feel the utmost extent of tyranny. He mortgaged the whole nation to his brother Richard for payment of thirty thousand merks, and empowered him to distrain their bodies and estates for that money. A particular exchequer was appointed to receive the monies squeezed from the Hebrew race; and upon occasions the tyrant added insult to oppression.

Historians report several instances of cruelty committed upon the persons of these people by torture, particularly that, at one time, the King demanded ten thousand merks from a certain Jew at Exeter, and commanded one of his teeth to be pulled out every day till he paid that sum. The Jew held out seven days, but submitted on the eighth, and parted with his money to preserve the rest of his teeth.

Regulations were often promulgated against this usury, and dispensed with as often for the convenience of the crown. In short, the tyrants of these times made use of the Jews as leeches to suck the blood of their subjects, and then forced the suckers to regorge into the royal exchequer. These glaring instances of bad government brought on the famous statute, *de Judaismo*, in the beginning of the succeeding reign, *anno tertio Edwardi primi*; which having cut off the favourite branch of their business by the absolute prohibition of usury, the Jews began to clip and corrupt the coin, for which the whole of them were banished England, in the eighteenth year of the same prince, and were not properly re-admitted until the reign of Charles II.

The

The Israelites, however, were not the only people who shared the spoils, which the folly and prejudices of the canonical interdiction in this island held out to strangers. The States of Italy, situated upon the coasts of the Mediterranean, were the first people of modern Europe who seriously engaged in trade; and for a considerable time they engrossed the commerce of the Western World. In order to manage their business with success, they sent companies of their countrymen to the several kingdoms with whom they were concerned; and experience soon demonstrated that England deserved their particular attention. History informs us, that, about the twelfth century, a number of Italian merchants had established themselves at London. Those from Lombardy were termed Lombards; and others from Pisa, Milan, &c. the Caurcini. Whether these last took their name from a particular family of negociators, is not known; but it is certain, that both they and the Lombards, envying the profits of the money-trade in the hands of the Jews, dropped their mercantile character, and rendered it entirely subservient to the arts of money-broking, usury, and extortion. According to Matthew Paris, the historian of the times, the Lombards carried the matter fully as far as the Jews, and found means to draw 60 *per cent. per ann.* for their money, which at last deservedly drew upon them the utmost severities of the law. The conduct of the Caurcini was not less blameable; but these gentlemen secretly put themselves under the protection of the Pope, who satisfied their consciences, and protected their persons. They termed themselves *Scambiatores Domini Papae*, the exchangers or bankers of our Lord the Pope. If his Holiness did not share the booty, which was strongly suspected, he converted these brokers into missionaries, for the purpose of facilitating the perpetual exactions of the Holy See from the kingdom of England. When the clergy or the people wanted money, these brokers were ready to lend it them. Upon what conditions you will immediately be informed.

The Roman law had established a distinction between stipulated usury and damages and interest. Even the modern civilians, who have

have written against the practice of taking profit for money, gravely tell us, that none of these prohibitions take place in the cases where the borrower failing in payment at the time appointed, the creditor demands payment of his money judicially; for then the lender not being longer obliged to grant a new delay, it is but just that he should have interest to indemnify him for the loss he sustains by the injustice of his debtor; but this interest (say they) hath nothing in it like to that which the creditor takes before the demand \*. Here then we have the distinction between the words interest and usury; the first is understood, not to be a profit for the use of money, but the legal damages a creditor is entitled to, by delay of payment upon the part of his debtor. All the theologians are agreed, that interest of this kind is not prohibited, but may be exacted according to equity and justice; and they term it *legitimae usurae*. This distinction, rather frivolous than subtle, is supported by a text of the civil law. 'Usurae non propter lucrum petentium, sed propter moram solvendum, infliguntur †.' All this is a mere parade of words, signifying nothing; for what consolation is it to the debtor to pay, under the name of damages or interest, what he would have paid under the title of usury. The Roman law further pointed out many instances where damages and interest became due, in some cases, upon demand; and others without demand, particularly distinguishing between a loan and a transaction. In the last, damages were allowed to be stipulated; because people might make what conditions they pleased, and the party contractor was supposed to give value for it.

Again, it was allowed to fix the damages, upon a failure, to a certain sum of money; and, in doing so, another distinction was made between the sums which were of a penal nature, in order to force performance, and sums determinately stipulated, beyond which the creditor could not raise his demand, but was obliged to accept of that

\* Domat. de mutuo.

† Dig. lib. 22. tit. 17.



that sum in full satisfaction of his loss. ‘ Quia non facit quod promisit in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus \*.’

The Italian brokers settled in England, were perfectly instructed in all these evasions, subtilities, and distinctions; they also brought the forms of obligations with them, drawn in all the cautions of the civil law. This clearly appears from a curious bond granted by the Prior and the Convent of Barnwell to the Gaurcini, in the month of April 1235, and in the reign of Henry III. †. This bond, like all other deeds of that age, and of ages after it, is written in Latin, tolerably

\* Cod. l. 42. tit. 1. De re judicata.

† ‘ To all men that see this present writing, Thomas the Prior and the Convent of Barnwell, with health in the Lord: Know ye, that we have borrowed and received at London, for ourselves, profitably to be expended for the affairs of our church, from Francisco and Gregoris, for them, and their partners, citizens and merchants of Milan, a hundred and four merks of lawful money, thirteen shillings fourpence Sterling being counted to every merk. Which said one hundred and four merks we promise to pay back on the Feast of St Peter *ad vincula*, being the first day of August, at the New Temple in London, in the year 1235. And, if the said money be not all paid at the time and place aforesaid, we bind ourselves to pay to the said merchants, or any one of them, or their certain attorney, for every two merks, forborn two months, one merk of money, for recompence of damages which the foresaid merchants may incur by the non-payment of it, so that they may lawfully demand both principal, damages, and expences, as above expressed, together with the expences of one merchant, for himself, horse, and servant, until such time as the aforesaid money be fully satisfied. And, for payment of such principal, damages, and expences, we oblige ourselves, our church, and successors, and all the goods of our church, moveable or immoveable, ecclesiastical and temporal, which we have, or shall have, whosoever they shall be found, to the foresaid merchants and their heirs. And we further recognise and acknowledge, that we possess and hold the said goods from the said merchants, by way of courtesy, until the premises be fully satisfied; renouncing for ourselves and successors all help of canon or civil law, all privileges of clerkship, all customs, lectures, statutes, indulgences, and privileges obtained for the King of England from the See Apostolic; as also the benefit of all appeal, or inhibition, from the King of England, with all exceptions, whether real or personal, that may be objected against the validity of this instrument. All which things we promise faithfully to observe; and in witness thereof, have affixed hereto the seal of our convent.’

lerably correct, and is the oldest deed of that kind to be met with in the records of England. Although dated seven hundred and fifty years ago, it may challenge any one drawn in the present century, in point of form, security, caution, and accuracy.

It contains the names and designations of the granters and receivers ; the receipt of the money ; and, as the borrowers were a society, a declaration of its being applied for the use of the community. It has a specific term for repayment, and a most rapacious penalty in case of failure. Upon this penalty two observations occur. The two marks *per* month, to be paid after the term, is not said to be for the use of the money : It is for recompense of the damages suffered by the creditor, according to the exact distinction of the Roman law. Not satisfied with that, the greedy Italian boarded himself, his servant, and horse, upon the poor convent. The word interest is not mentioned, and nothing is stated from the date of the bond to the day of payment ; but, after that time, they indemnify themselves by the monstrous exaction of 60 *per cent. per annum*, stating the damages by months, according to the ancient Roman practice, in the case of interest. This bond is more than personal. The convent is made to hypothecate their church goods, moveable and immoveable, both present and to come, for payment of the money ; and, as the Roman hypothec was a real right, which entitled the creditors to take possession of the property, the granters of the bond are made to declare, that they hold every thing by courtesy from the brokers until the debt be paid. Conscientious of gross iniquity, the framers of this extraordinary bond concluded it with a renunciation of every law and every defence in equity, by which that injustice might be redressed.

Hence, it appears, that the Roman obligation, or bond, which was the model of ours, found its way to Britain as early as the beginning of the thirteenth century.

The canonical prohibition still remained, which prevented a rate of moderate interest from being settled by law, and at the same time corrupted

corrupted the manners of the people, by forcing them upon a variety of mean shifts in order to evade it. Dr Burnet, in the History of the Reformation, tells us, ' That, for avoiding the severity of the law, the invention of mortgages had been fallen upon ; and those who had no land to sell, fell upon another way : The borrowers bought their goods, to be paid within a year ; for instance L. 110, and sold them back for a sum to be presently laid down, as they should agree, it may be L. 100. By this measure, the one had a hundred pound in hand, and the other was to have ten pounds, or more, at the year's end \*.' But this being in the way of sale, continues the Dr, was not called usury. These were miserable devices ; at last people tired of these evasions, and went roundly to work. Any bargain might be made, which did not specify interest, and any damages might be stipulated for delay of payment ; and, therefore, when a man lent a sum of money, he took a bond or obligation not only for the sum actually lent, but for a third or fourth part more, equivalent to the premium, or interest, agreed upon between the date of the bond, and the term of payment. This was called a simple obligation, or single bond, and sometimes a bill.

The later regulations of the civil law allowed damages and interest to the extent of double value in the cases of sale, location, and certain other contracts. From this a hint was taken. People lent a sum, and took a bond for the double ; which bond was sometimes qualified by a separate memorandum, bearing, that if the debtor paid a sum certain at such a time, he should be discharged ; if not, the whole became due as damages. This was a sharp abuse of the civil idea of damages and interest ; but it answered the purpose. The bond thus taken came to be called double, because they were taken for double the sum. If the condition happened to be performed, there was an end ; if not, it was provided that the bond should stand firm and good.

Thus the prohibition of interest was evaded by the grossest of all devices ; and the debtor stood obliged to pay the rate of interest ex-

C 2

acted,

\* Vol. 2. p. 192.

acted, or forfeit the bond. All obligations, by the common law of England, received an interpretation according to the strictness of the words; and, therefore, when an action was brought in a court upon these bonds, the judges, although they knew the real intention of parties, thought themselves obliged to give decree for the whole sum. Sir William Blackstone apologizes for this. ‘The penalty of a bond, originally contrived to evade the absurdity of these monkish constitutions, which prohibited taking interest for money, was very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest; for the judges could not, as the law then stood, give judgment, that the interest should be specifically paid\*.’ Imagination itself is incapable of conceiving a higher degree of inconsistency in the affairs of men. The judges could not award interest for the money; that would have been contrary to law, a moral evil, and an oppression of the debtor; but upon the idea of damages, and the failure of the debtor in performance, they unmercifully decreed for double the sum borrowed. Thus the ideas of forfeiture, of obligation, and damages, imbibed from the Roman law, joined to the prohibitions of the church, concurred, in direct opposition to their original principles, to produce that monster in practice—an English double bond. The injustice was too glaring to be suffered; and therefore debtors applied for relief to the courts of equity, who did not think themselves bound by the same rules, which at that time constrained the courts of law. In these courts, the double bond was constructed according to the true intendment, and reasonable damages given for the loan, at the pleasure of the judge. At last, the eyes of the nation began to open upon this matter. They began to discover, as Sir William Blackstone well expresses it, ‘That the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience, which, it seems, meant to remedy; the necessity

\* Vol. 3. p. 434.

ty of individuals, will make borrowing unavoidable. Without some profit allowed by law, there will be but few lenders; and those principally bad men, who will break through the law, and take a profit, and then will endeavour to indemnify themselves from the danger of the penalty by making that profit exorbitant. In the dark ages of monkish superstition, and civil tyranny, commerce, when interest was put under an interdict, was also at its lowest ebb; and fell entirely into the hands of the Jews and Lombards; but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit, and again introduced with itself, its inseparable companion, the doctrine of loans upon interest \*.

By the act 37. of Henry VIII. this interest was fixed at ten *per cent.* In the days of his son Edward, the old prejudices revived. Henry's act was repealed, and all gain for money once more discharged. Elizabeth was too wise a princess to allow this prohibition to remain. In the thirteenth year of her reign, her father's act was restored. The rate of interest has always varied according to the quantity of cash in the nation; for, if a man can get money to borrow at so much *per cent.* his damages for want of payment must be limited to the same rate. In the reign of James I. the trade of England increased from the advantage of a long peace. Individuals grew more opulent, and ready cash more plenty. Lenders of money may be said to undersell one another, like dealers in other commodities; and therefore by the 17. act of the 21st parliament of James I. the legal interest was reduced to 8 *per cent.* In the time of Charles I. it fell to six. What was interest in the days of Henry and James, turned usury in those of Charles. When interest came thus to be publicly allowed, it might have been expected, that the form of the common English bond would have altered. This, however, did not happen. Hear Judge Blackstone's reflections upon the subject: 'But when afterwards the taking of interest became legal, as the necessary compa-

\* *nion*

\* Blackstone, vol. ii. p. 456.

‘ nion of commerce ; nay, after the 37th of Henry VIII. c. 9. had  
 ‘ declared the debt or loan itself to be the just and true intent, for  
 ‘ which the obligation was given, their narrow minded successors,  
 ‘ *i. e.* the judges at common law, still adhered willfully and techni-  
 ‘ cally to the letter of the ancient precedents, and refused to consider  
 ‘ the payment of principal, interest, and costs, as a full satisfaction  
 ‘ for the bond. At the same time, more liberal men, who sat in the  
 ‘ courts of equity, construed the instrument according to its just and  
 ‘ true intent, as merely a security for the loan, in which light it was  
 ‘ certainly understood by the parties ; (at least after these determina-  
 ‘ tions) and therefore, this construction should have been univer-  
 ‘ sally received \*.’

The inconveniences which followed this opposition of the courts of the kingdom, in the construction of a bond, the deed most frequent of any other in the business of life, obliged the Legislature to interpose. This was done by the 4th and 5th of Queen Anne, c. 16. which provided, that, ‘ in debt upon bond, if the defender before action brought, had paid the principal and interest due by the condition or defeasance, he may plead payment in bar ; and pending an action on such bond, the defendant may bring in principal, interest, and costs in law and equity, and the court shall give judgment to discharge the defendant.’ And by 7th of George II. c. 20. the matter was brought to perfection ; and the courts of law specially empowered to act in the same manner as a court of equity.

After all this, it was certainly to have been expected, that the English bond would no more have been taken double, but put in a form simply expressive of the purpose of the deed : Conveyancers were now no longer under the restraints which forced them to continue a fiction in their practice ; yet so it is, that little or nothing has been altered. The deed remains at this moment, in words and  
 in

\* Blackstone, vol. iii. p. 434. 435.

The recognisances authorised by statutes, in the case of merchants, are the first proper and legal bonds or obligations to be met with in the forms of England; and several of these statutes prescribe the exact form to be used upon every occasion; beginning with '*noverint universi per presentes me,*' 'know all men by these presents, that I;' for all deeds were at that time written in Latin. As the forms of these obligations, which were termed bonds of record, were approved of by act of Parliament to be perfect assurances, it was natural to adopt the same form in the case of private deeds. The modern English bond is not after the Roman model, but exactly that of the judicial recognisance; though the difference between these consists in this, that the former creates a new debt, while the latter acknowledges a debt already contracted, the one speaking in the present, and the other in the preterite tense. There is no term of payment mentioned in the writing itself, because the old common law considered it only as the evidence of a debt, or as a simple obligation, which the creditor might demand when he pleased, by action in a court of justice. The condition then is the only circumstance which discovers the nature of the transaction: 'The principal thing (says Wood in his 'Institute of the laws of England) contained in an obligation, are 'the parties, and the sum of money; and when both are properly 'expressed, it will be sufficient. The sum of money intended, may 'be often found out by comparing the obligation and the condition; because the obligation is usually in a double sum to the sum 'mentioned in the condition \*.' It is the condition then which alone qualifies the bond; sometimes it was made by a separate writing, or

as

'paid, unto the above named Abraham Barker, his executors, administrators, or assigns,  
'the full sum of five thousand pounds of lawful British money, with lawful interest for  
'the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void and of none effect; or else shall be and remain in full force and virtue.

'Sealed and delivered, being first duly stamped in the presence of ———.'

\* Inst. Law of Eng. p. 289.

as we would say, by a back bond; at other times it was written on the back of the bond itself, and then by universal practice, came to be annexed at the foot, where it now always makes its appearance.

Before interest came to be publicly allowed, a certain sum was mentioned in the condition, equal to the interest or damages during that time; and if the debtor did not continue to pay according to the same rate, he was instantly attached for the whole, and could not be relieved, but by a court of equity, upon payment of the principal, costs, and damages, in proportion to what the Civilians term the injustice of the delay: For the judges in equity being always churchmen, their decisions were often modelled upon the rules of the Roman law. I shall dismiss the English bond with a single observation, viz. that if it was to lie over for twenty years, without any payment of interest, the interest would then equal the capital, and the effect of the writing change sides: The creditor would lose all the interest becoming due after that time, because the utmost extent of his demand could go no further, than the forfeiture of the debtor's condition. In this light Lord Stair considered it; he looks upon the interest due upon this deed in the true primitive light, *i. e.* not as due by stipulation, but as a penalty for non performance; and as penalties can or ought to go no further than the principal, 'therefore, (says he) we extend not annuals in the English double bonds beyond the stock, because they are penal, and should do the like in any penal annuals, but not in conventional annuals \*.'

I now come to the Scottish *band*, for so in our language this writ was termed. A *band* is the Gothic or Swedish word for it at this moment. In our ancient laws, by which I mean the Regiam Majestatem, and the statutes and treatises published by Skene, no such technical term is to be found, it is always denominated by the Ro-

VOL. I

D

man

\* Stair, p. 153.



man term *obligatio*. ‘ An debt (says the *Quoniam attachiamenta*) ‘ may not be otherways proven, but by ane letter obligator, or by ‘ confession of the debtor in court\*.’ Neither does it appear that any form, similar to the English judicial recognisances, was established in Scotland ; for though our Robert I. made an act for payment of merchants debts, in imitation of the statute merchant of Edward I. his act respects the execution against the debtors, rather than the establishment of the debt. Edward’s statute chalks out the mode of the recognisance for that purpose, but that of Robert supposes it to be done : The preamble of the Scottish statute is, ‘ gif an ‘ merchant has proven his debt owing to him be an assize, or by ‘ any other manner, the mayor of the town shall take and apprehend the debtor,’ &c.

Towards the end of the fourteenth, and beginning of the fifteenth century, the Roman law had become the prevailing jurisprudence in Scotland ; and, as I formerly observed, the notaries-public, and clerical conveyancers, had exhausted their learning and their knowledge, by introducing into the substance of private writs and securities, all the niceties, the technical terms, the subtleties, and exceptions of the Roman jurisprudence, though it neither corresponded to the manners of the people, nor to the state of society at the time. It is to the introduction of the Roman law, and the vanity of the ecclesiastical conveyancers of the fourteenth century, that the tautology, redundancy, and repetitions, so much complained of in our styles, are wholly to be imputed. All the transactions between England, France, and Scotland, were executed by deeds formed in this ostentatious manner ; entirely founded upon the Roman law. This style had the benefit of being universal, like the Latin language itself, all over Europe ; and it was the pride of the notaries-public, who were then appointed and instructed by the Pope, to vie with each other in the number of their clauses, in the excess of precautions, and endless verbosity of expression.

After

\* Reg. Majest. c. 81.

After detaining our James I. eighteen years in England, the governors for Henry VI. refused to allow him to return to his kingdom, but upon condition of paying the enormous sum of L. 40,000 Sterling. The miseries of the Scottish government at the time, and the ardour of the people to recover their lawful Sovereign, forced the men in power to comply with a demand so much exceeding the abilities of the nation. The securities demanded by the English governours, were separate bonds from the towns of Edinburgh, Aberdeen, Perth, and Dundee, the delivery of a great number of the young nobility as hostages, bonds from each of their fathers, obliging themselves that their sons should remain in that character, till payment of the money, and last of all a bond from the King himself. All these deeds are to be found verbatim in the noble collection of ancient records, published by Mr Rymer, from which I beg leave to give as a specimen of the style of the times, the bond granted by James, which is dated the 8th March 1424\*.

D 2

This

\* James by the Grace of God King of Scots, to all to whose knowledge these letters shall come, greeting:—Know ye that we James King of Scots, aforesaid, are held and firmly bound to the Serene Prince Henry King of England, in forty thousand pounds lawful money of England, to be paid to the said Henry, his heirs, and successors, or to their certain attorney or depute, in the church of St Paul of London, in England, viz. ten thousand merks within six months, computing from the first day of our entry into our kingdom of Scotland, or from the first day that we might have entered into our said kingdom: And also ten thousand merks each following year, beginning one after another, computing from the first day of our said entry or power of entering, within six months from the beginning of each year, in the church of St Paul, aforesaid, until the said forty thousand pounds be fully and entirely paid: For the which payment, well and faithfully to be made, at the days, terms, and place aforesaid, we oblige us, our heirs, and successors, whatsoever, Kings of Scotland, and all our goods, moveable and immoveable, present and to come, wherever the same are situated or can be found.—And we hereby submit ourselves, our heirs, and successors, aforesaid, and our goods abovementioned, to the laws, coercions, rites, compulstors, statutes, consuetudes, and plain jurisdiction of our Lord the Pope, his auditors, vice-auditors, and other courts, as well ecclesiastical as secular, wherever the same are constituted,

This bond, though sufficiently diffuse and redundant, is less exceptionable in that respect, than any other deed of the same period I have met with.—To explain all the parts of it, would, at present, take up too much time: I shall only make a few observations, which may throw light upon the remainder of our subject.

‘*To all to whose knowledge these present letters shall come.*’ Before the use of writing became common in Europe, all deeds public and private, judicial and extra-judicial, were termed by way of distinction *letters*; afterwards they came to be distinguished by the different purposes to which they were applied: The bulls of the Pope were anciently termed *litterae apostolicae*; the King’s letters were termed *litterae regales*; and private deeds were termed *litterae obligatoriae*; letters of discharge, *litterae acquietantiae*, &c. Charters were distinguished into *litterae patentes*, and *litterae clausae*. In short, letters were a general title, sometimes even applied to contracts and indentures, which no doubt had its origin from the Roman distinction, in the execution of contracts, *re, verbis, et literis*. From these, letters between private persons were distinguished, as they are yet, by *litterae missivae*; but, in fact, all deeds whatever, were, and still are, conceived

‘constituted; in which either these present obligatory letters; or true or authentic transcripts thereof, happen to be presented or produced. Renouncing hereby publicly and expressly, all and whatsoever laws, as well canon, as civil, divine and humane, written or not written, new and old, general and special, promulgated or to be promulgated, with all other statutes or customs whatsoever: As also, the exceptions of fraud and fear, not numerate money, action upon the case, *condictio indebiti*, without a cause, or from an unjust cause, the privilege of the forum, the *feriae* and the holidays of harvest and vintage, the Papal letters or rescripts, either granted or to be granted, impetrated or to be impetrated, and generally all and whatever laws, privileges, and defences, of whatever denomination, by which, or through which, we could come against these present obligatory letters, or whereby we might be benefited in any shape: And in testimony of all and singular the premises, we have made our seal be appended to these presents.

‘Given under our privy seal, this eight day of March 1424, in the eighteenth year of our reign \*.’

\* Rhymer, vol. x. p. 326.

conceived in the form of a letter of correspondence. The Greeks observed a formula in their letters, both public and private; they began with the name of the writer, and the person to whom they were written, then followed a salutation; and in the conclusion a wish for health and happiness to the party. The Romans copied this formula, and modern Europe has followed them; only, in place of the ancient simplicity, we have adopted the unmeaning terms of French compliment. A charter from a Prince, or an order of Government, is a letter directed to his officers, or to his subjects in general; and therefore, began with the broad address of ‘*omnibus tam futuris quam presentibus*’; or, ‘*universis presentes litteras inspecturis*’; or some equivalent expression. The clerical notaries, in taking deeds in favour of the church, began by an invocation in the name of the Father, Son, and Holy Ghost; and, as the Christian donors thought that the world were concerned in a good example from them, their deeds were directed: ‘*Universis Christianis fidelibus presentibus et futuris*’; and hence the old style of deeds in this island; ‘Be it known to all men that this present writing shall see or hear.’

When we come to treat of the charter, I propose to give a more succinct account of all these phrases of common style, according to the order of their introduction. So far was necessary at present, to account for the accustomed style of common bonds, and other personal deeds, which were all with us formerly termed letters; although that term, both in France and in Scotland, is now confined to royal letters alone, or such as are issued in the King’s name, for the purpose of execution. But to return to the bond of James I.

‘Know that we the foresaid James King of Scots, are held and firmly bound to the Serene Prince Henry King of England, in L. 40,000 lawful English money.’ This is not the style of the Roman obligation, but of the English recognisance; the writer of the bond did not mean it should be so, for in every other respect the deed is taken according to the dictates and ideas of the Roman law;

law ; and consequently, suited to the understanding of the lawyers of all countries, and capable of execution every where. There is no mention of interest for the money ; that would have been entirely incompatible with a public deed of this kind ; but the King is made not only to bind himself, his heirs, and successors, for the payment, but likewise his whole moveables, and immoveables, present and to come, similar to the Italian bond formerly taken notice of. The Roman law allowed a man to grant a right upon his lands, and even his moveables, without quitting the possession of them ; and this from the Greek term is called a *hypothec*. This right gave the creditor a preference to others over the goods hypothecated. The right which King James is here obliged to give, is, what the Civilians term an universal hypothec, which was to affect his whole property. There is no penalty or damages in the bond ; that matter was to be determined by the Judge named to enforce the execution. This Judge could be no other than the Pope or the dignified clergy, who were at that time the arbiters of princes ; and therefore, James submits himself and his property, to the laws, coercions, rights, and compulsion, of his Holiness the Pope, and his sub-auditors, before whom his obligatory letter might be produced. This was the clause of registration in these days ; and we shall afterwards learn, that the execution issuing in consequence of it, was sufficiently effectual. Next follows a renunciation of all the exceptions and subtleties, which by that time had diffused themselves from the Roman law, over all the Courts of Europe. Here we find the ' exception of not ' numerate money,' the *condictio indebiti*, or action for recovery of a sum wrongfully paid, and other exceptions, which our forefathers never thought of, until the Roman law put them into their heads ; and what shews the absurd rage of the notaries for every thing that was Roman, the King of Scotland is made to renounce the benefit of the *feriae* or holidays of harvest and vintage, a custom peculiar to old Rome, and the countries of the vine.

I have :

I have annalized this ancient bond, in order to give an idea of the style which followed the introduction of the Roman law, and to shew that our forefathers, the Scots conveyancers and writers to the signet, are not to be blamed for the redundancy, tautology, or other faults of our forms; they found them all made to their hands, and have, upon the whole, rather abridged than extended them.

There are none of our acts of Parliament, prescribing any particular form of the bond, or of the recognifance, like those in England. After the accession of James, every thing to which our old customs did not apply, came to be regulated by the Roman law, and among others, the form of the bond, which was entirely Roman. The act of James III. 1469, introducing the negative prescription of obligations, mentions, ' That it was advised that the party to whom the obligation is made, shall follow the said obligation.' No mention is made of the term bond.

Accordingly, our oldest lawyer Balfour extracts from the Roman title *de Obligationibus*, almost every word he has left us upon the subject: ' An obligation (says he) is ane band of the law, be the whilk a man is bound by ressoun of ony band or contract; ane obligation should contain sax principal parts and punctis, quhair of gif only ane failzies, the rest is of nane avail, force, nor effect; first, His name and surname wha makes the obligation,—2d, His name and surname to whom it is made,—3d, The thing wherefore it is made, and quhat it is, and how meikle it extend to,—4th, The cause quhairfor the obligation is made, viz for buying, selling, lending, borrowing, or any other reasonable causes,—5th, The place and term of payment,—6th, Securitie for fulfilling of the premises, and also for payment to be made als well of the principal thing or soume contenit in the said obligation, as of the interest, costis, and skaithis, that shall happen to be made throw non-payment thereof. *Item*, Sum ar of opinion that an obligon should

‘ sould contene ane pane to be upliftit fra him, that is oblist in case  
 ‘ of his failzie, be the judge under quhais jurisdiction he dwells \*’

The obliging, or hypothecating a man’s property, according to the Roman law, as James was obliged to do in his bond, continued long to be the law of Scotland: ‘ It is liesom (continues Balfour)  
 ‘ to any man to bind or oblis his gudis and gear, present or to  
 ‘ come, or the fruits of the ground purtenand to him, and it beand  
 ‘ thereupon; gudis or gear corporal, as horse, or incorporal, as obligations of debts, weddis, or liferents.’ The very same method of forfeiting double the sum borrowed, under pretence of failure, seems to have been attempted in Scotland; and to have succeeded during the prohibition of interest, and that, though done in a more direct and open manner than in England. Balfour cites two decisions upon the subject, which shew, that bonds were taken for the real sum lent, under the condition of forfeiting the double in case of non-payment upon a fixed day; whereas the English more cunningly took their bonds for double the sum lent, and made the restriction of it conditional: ‘ gif ony man obliffes him to content and  
 ‘ pay to an uther, ony certain soume of silver, or uther money, at  
 ‘ an certain term or diet, convenient betwixt them, and contentit in  
 ‘ the obligation, under the pain of double payment of the said  
 ‘ sum; or if he failzies to make payment of the samin, after the  
 ‘ tenor of the said obligation, and at the day or termis to the whilk  
 ‘ he oblist himself; he may be callit be his creditour to hear him  
 ‘ discernit be an judge, to content and pay the said principal soume,  
 ‘ togidder with the double thereof; viz. als meikle again as the  
 ‘ same soume extendis to, because he falziet, as said is, to mak pay-  
 ‘ ment at the day appointit. 5th Julii 1501, The Laird of Cock-  
 ‘ puil against Simon Carutheris of Mauswall; 26th Februarii 1506,  
 ‘ The King’s Thesaurer against the Earl of Caithness†.’ Thus the prohibition produced the very same effect in Scotland, as it did in  
 England.

\* Balfour, p. 149. 150.

† Ib. p. 150.

England. Instead of preventing oppression in the commerce of money, it brought on the inevitable ruin of the debtor; and the courts of law, actuated by the ideas of the civilians, which directed a strict interpretation of the engagements and stipulations of parties, thought themselves bound to give legal force to these acts of rapacity.

The ancient laws of both kingdoms, with respect to usury, exactly coincided, not only in the mode of prohibition, but in the punishment of the usurer; and it is almost certain that they continued to be so for a very long time, and yet there is no mention of it in any of the statutes of the five James's, excepting the twenty-third act of James II. which provides that the keepers of victual to a dearth, shall be punished as ockerers, *i. e.* usurers; consequently usury was a crime commonly punished, and the punishment familiar to the people; and, rather than admit any kind of direct profit, by the last decision quoted from Balfour, the judges chose to award double the sum against the debtor, under the title of conventional damages. This severity no doubt taught people to beware of granting bonds of this kind. They made the penalty, therefore, no higher than they laid their account with paying. Upon another rule, however, of the doctrine of penalties, all drawn from the Roman law, the debtor attempted to turn the tables upon the creditor. When a penalty, say they, comes in place of the principal obligation, it is optional to the party bound, either to perform or to pay the penalty. The debtor gives, therefore, a bond for a hundred pounds payable upon a day certain, under a penalty of thirty, in case of failure. Now, says he, I choose to incur the penalty, and pay the thirty. This was as unjust upon the part of the debtor, as the demand of double the sum had been on the creditor. The court, however, decreed both for the penalty and the principal sum; 19th July 1502, Bruce against Lindsay\*. At last, about fifty years afterwards, the judges seem to have put the matter of penalty upon the proper and solid footing;

E

and.

\* Balfour, p. 157.



and thereby cut off the oppression which took place between man and man, upon account of the mistaken notions about these stipulations. In March 1548, in a case Home against Hepburn, the Lords found, 'That, by the law of this realm, *poena conventionalis*, sic as  
 ' an soume of money adjectit, with consent of parties, in ony con-  
 ' tract or obligation in name of pane, may not be asked by any per-  
 ' son, but in so far as he is interestit, hurt, or skaithit; because all  
 ' sic panis are in ane manner usury, and unhonest, made for lûcre  
 ' or gane \*.' The penalties being thus reduced to their proper and equitable intention, it may be presumed that the judges continued to allow a reasonable part of it in consideration of the interest, skaith, or damages; however, from the following decision, it is evident, that the prohibition continued against bargaining for, or taking any direct sum upon loans in name of profit. 'Gif ony man borrows  
 ' fra anuther an certaine soume of money, and obliissis him to pay  
 ' zierly a certain quantity of silver thereof, safine following there-  
 ' upon; or zit ane certain quantity of victual, ay and quhile he re-  
 ' stoir and deliver the principal soume, he may not be compellit to  
 ' content and pay the said zierly soume or quantitie: Albeit the ob-  
 ' ligation be registrat and insert in the books of an ordinar judge;  
 ' because, gif he that lent the money seik execution upon the obli-  
 ' gation, the borrowers thereof may alledge the samin to be foundit  
 ' upon an obligation, or act of mere ocker; the quhilk he prievand  
 ' sufficientlie, aught and fauld be decernit to restoir the principal  
 ' borrowed soume allendarlie; 26. January 1561, Dick against Lo-  
 ' gan †.'

There is a decision in Haddington, which, if the date be right, though I suspect it is not, goes to prove, that the court returned again to their ancient error. Thus it stands in the Dictionary: A sum being contained in an obligation, with a back-bond written on the back thereof, declaring that the creditor, in case of payment of the half of the sum at a day certain, should discharge the whole,  
 the

\* Balfour, p. 151.

† Ibid. p. 533.

the debtor having failed, the Lords found that he might be charged for the whole, and that it was not usury; July 1595, Craven against Wilfon \*.

By the decision, Dick against Logan, no penalty seems to have attended the demand of interest; for the creditor was entitled to get back his principal sum. This decision was given in Scotland only about five years after the act of Henry VIII. allowing 10 *per cent.* to be taken upon money lent in England. The next year, it was found, that a debtor might pay interest, or maintain a minor during his minority, without diminution of the principal sum, 'and that the same was na ways usury;' 15. December 1562, Gourlay against Thomson †.

Notwithstanding the general prohibition of the law, the commerce of money in Scotland went on by means of bargains of victual, pledges, and other covered methods; so that, before any direct alteration, the taking of a profit for money seems to have been established in practice, which was no doubt encouraged and supported by the public introduction of interest into England. This stands completely proved by the first statute to be found upon the subject, c. 52. of the 11. parliament of James VI. *anno* 1587, about thirty-five years after the date of the English act ‡.

It is plain, that this act was not meant to authorise or introduce, but to restrain the practice of taking profit upon money to the fixed rate of 10 *per cent. per ann.* as established in England. Here we have the methods pointed out, in which the money transactions had been executed; and by the exception made of all bonds, contracts, &c. dated prior to the statute, it is plain, that these must have carried more profit to the creditor than the interest allowed by the act, and yet they are therein termed lawful bonds, contracts, &c. From all which we are entitled to conclude, that we owe the abolition of the ancient monkish prejudices in this country, not to the wisdom of the legisla-

E 2

ture.

\* Dict. of Dec. vol. 2 p. 498.

† Balfour, p. 533.

‡ Scots Acts, vol. 1. p. 559.

ture, but to the common sense and invincible necessities of the people. This statute then established with us the solid distinction between the words *usury* and *interest*. Legal interest is what the law allows to be taken; and usury is confined to the excess or surplus profit for the loan of money more than the law allows. The usurer is, by the act, to receive punishment, conform to the laws of the realm, already made and established thereupon. None of these laws, however, can be found, except those mentioned in the Regiam Majestatem.

The reference to the old law seems to have been a careless expression. It left the crime of usury without any determinate punishment, which the legislature very soon found necessary to supply. This was done by the 226. act of the 14. parliament of James VI. ann. 1594, which declares, 'That the usurer taking more than 10 *per cent.* shall forfeit the principal sum to the debtor; and if he concealed it, any other person informing, was to have had the same title.' Sir George M'Kenzie says, that taking annualrent before hand, is by this act determined to be usury\*. This is a mistake. The act says, that whoever shall take more than 10 *per cent.* before hand, or after the year or time, shall be counted usurers. These words show, on the contrary, that taking interest before hand was at this time allowable.

The disposition of the money-lenders to usury seems to have been almost invincible. The old methods went on, and new ones were contrived chiefly by the means of bargains of victual, wadds, or pledges; as also by retaining the usury out of the capital at the time of lending. These evils grew to such a height, that a very particular act was made to suppress them in the 15. parliament of James VI. c. 251. when the bonds, contracts, &c. were declared null, and the principal sums forfeited to the King. From this statute we learn, that the passion of avarice suggested the same devices to usurers of all ages and countries. Horace's money-brokers, in  
old

\* Mackenzie, vol. 2. p. 144.

old Rome, practised the same stratagems with the Scottish usurer in the 1597. The purposes of the act were defeated from the difficulty of proof; and therefore, by the 7th act of the next parliament, 1600, it was explained, and the fact rendered probable, either by writ, or oath of party, or witnesses. The money-lenders, by this statute, had their ingenuity very much confined; and, at last, they restricted themselves to the very ancient method of taking the interest beforehand. An act was therefore made to check this evil, in the 23. parliament of James VI. 1621, c. 28.

James VI. as you have heard, reduced the interest in England to 8 *per cent.* In Scotland, it remained at ten till the 21. act of the first parliament of Charles I. which reduced it to eight. The preamble of the act is, that his Majesty's subjects 'have been heavily  
' oppressed and burdened with exorbitant annualrents and interest,  
' taken for the use of money, far exceeding the rate and proportion  
' taken in England, France, and other neighbouring countries \*.'

In the 1649, the interest fell to 6 *per cent.* and was fixed at that rate by an act of the then parliament, c. 29. This being one of the statutes of the rebellious parliament, the act was first rescinded, and then restored by the 49th of Charles II. 1661; so that, in the reign of Charles, the interest of both England and Scotland stood at 6 *per cent.* No alteration was made either in the reign of Charles, James VII. or William, only as often as extraordinary supplies were raised by the landed interest to the King, retention was allowed to be made by debtors, out of all annualrents, by a train of acts of parliament, sometimes of one, and sometimes of a half *per cent.* in order to relieve the lands, and lay a proportion of the burden upon the monied interest.

This ease given to debtors was termed the retention; and, as the allowance was temporary, our statute books, our deeds, and our diligences, from the reign of Charles II. to the union of the kingdoms, are full of regulations regarding that circumstance.

Having

\* Vol. 2. p. 62.

Having thus given a detail of the laws and practice of Scotland, respecting the interest of money, and the different regulations on the same subject in England, which led to the explanation of their double bond, I come now to give the history and principles of the common Scottish obligation, termed a moveable bond. As I begin with the old form, which is the very first deed in Dallas of St Martin's collection, I stop the progressive account of interest at the laws which were in force when Mr Dallas published his system.

The Romans termed a bond, or other evidence for money, *nomina debitorum*; because the names of the debtors were usually inscribed upon the top of the deeds. They divided things themselves into moveable and immoveable, according to the nature of the subject. Lands, houses, and all their parts were immoveable; and cash, furniture, pictures, animals, and statues, were moveable. Debts, and other things which are not in the occupation of the party, but which he is entitled to be possessed of, such as debts due to him, &c. were called personal rights. Of these, the chief was the obligation, which is so termed, as it regarded the debtor, and obliged him to do and perform; but, as it stood in the creditor, had no proper name, but that of the right to demand the possession or delivery of the debt, or whatever else the debtor stood bound to pay or perform. The natural distinction of moveable and immoveable among the Romans had little or no relation to succession; the heir or the heirs took the whole property of the deceased, moveable and immoveable, in equal divisions. The northern barbarians, who established themselves upon the ruin of the Roman Empire, and founded the several kingdoms of modern Europe, paid little or no attention to any thing but to the land, and its appurtenances. The feudal system, which arose out of the customs and manners of these people, had the land alone for its object. The rude and simple manners of these savage conquerors, and their posterity, taught them to pay little regard to what we term moveables; which, for the most part, are intended to supply wants they did not feel. ‘ Immoveables, as lands, houses, and  
‘ profits

‘ profits issuing from them,’ says Judge Blackstone, ‘ were the principal favourites of our first legislators, who entertained a low and contemptuous opinion of all personal estates, which they regarded only as a transient commodity \*.’ It was a considerable time, therefore, before the first lawgivers, or the first writers, paid any respect to it ; and even in England, as Judge Blackstone observes, the oldest books of the law contain not a single chapter upon the head ; and the little that is to be found in their immediate successors, seems principally borrowed from the civilians. When, with the progress of society, personal estates increased, they drew more attention ; and the Roman law, by that time become universal, afforded maxims ready formed for their regulation. Things then, in imitation of the Romans, came to be distinguished in this island into real and personal. The real answered to the Roman division of immoveables ; and the personal included both the moveables and the rights. To answer that subdivision, the personal estate also divided into chattels, and what they term *chofes in action*, i. e. every thing not in a man’s own occupation, but of which he is entitled to be possessed by a suit or action at law ; and thus money due on a bond is a *chofe in action* ; because the actual possession of it cannot be had, if the debtor refuses, otherwise than by judgment and execution of the law. The distinction of moveable and immoveable, personal and real, became of much more importance among the feudal nations, than it had been among the Romans. The right of primo-geniture, established by the feudal system, and which came at last to affect the subsistence and aggrandisement of families, bestowed the whole estate, or immoveable property, upon the first born male descendant, and the moveables, or personal estate, upon the other children.

In Normandy, and in England, the feudal pride tended to make every possible distinction, between the transcendent qualities of a fief, heritage, or freehold, and rights or properties of any other kind. These last were to be held in no degree of estimation, when  
 compared

\* Vol. 2. p. 384.

compared to the other. A fief was immoveable in its nature, and appeared eternal in its duration ; therefore all subaltern rights, falling short of these high qualities, were held unworthy to stand in the same rank : It behoved them to fall into an inferior class of their own. Such properties were termed in Normandy *catalla*, and in England chattels. This feudal pride proved a happy circumstance for younger children : A lease for years, though it concerns the possession of heritage, yet because it has only a duration, is a chattel ; a mortgage, though a right upon land, is only a right determinable at the will of another, *i. e.* may be redeemed by the proprietor of the lands mortgaged, and is there also a chattel ; and so is every other debt upon land. To distinguish these from common moveables, they are only called chattels real, hence money due by a common bond or *chose in action*, has always in England been a mere moveable, falling to executors.

With us in Scotland, matters took a very opposite course.—To trace it in its changes, would at present lead us much too far ; but, being a subject of great curiosity, will be resumed on another occasion. There are several causes which contributed to the same effect. The chief of them was, that our annualrents purchased upon land in Scotland, were not redeemable ; and therefore, were considered in the same light as the lands themselves. Our ancient apprising of land for debt, carried the property immediately to the creditor, as effectually as a decret of sale does at present, so that no reversion remained in the person of the debtor ; and by our adherence to the feudal forms in our wadsets and securities, all rights upon land carried the appearance of separate feus. Every thing was done by charter and seisin, superior and vassal ; all our superiors and vassals were governed by the same system of laws ; so that the rules which applied to a great Lord in quality of a superior, also applied to the superior of an annualrent, and a wadsetter ; and it behoved the same forms to be gone through in either case. These circumstances excluded the distinction of the chattels real in Scotland.

land. Instead of contemplating the defects of temporary rights, when compared with the complete and perfect fief, our ancestors looked only upon the points of resemblance between these things. They saw where they coincided, and refused to pay attention to any other circumstance ; hence all rights which regarded, or stood connected with a feu, were classed along with it ; and hence the law of Scotland came to acknowledge no other distinction, but that of heritable and moveable. The first comprehends all immoveables, or things connected with, or dependent upon them, which the law has destined without exception to the heir ; and so fond have we been of the rights of primogeniture, that the very words real or immoveable, used by other nations, have been by us changed to *heritable*, a word which has no relation to the nature of the thing, but only to the legal destination. For the other division, we have retained the term proper to its nature, *i. e. moveable*, a word relative to the thing, and not to the person who succeeds to it : And hence has arisen the grand distinction of property in the law of Scotland, into heritable and moveable.

Money lent upon the security of land, is consequently heritable like the land itself. The common security taken for it, is upon that account called an heritable bond, and money lent upon the security of the person, being moveable, the obligation taken for it is called a moveable bond, which, in the course of succession, goes to the executors of the defunct. In England, the latter would be simply a chattle, and the other a chattle real, and both would belong to the younger brother, or nearest relations of the possessor, or, according to the language of our law, to the nearest of kin.

From the universal prohibition of taking a profit for money, the internal commerce of Scotland was for a very long period restricted, like that of the neighbouring nations. The statutes have informed us of the numerous contrivances, which the people were forced into, in order to elude the effect of these irrational and impolitic prejudices. The most successful and unexceptionable of these methods,



proved to be the purchase of annualrents out of land, and the taking of wadsets, both of which were deemed to be heritable rights, descending, like the land itself, to the heir. The lending money upon personal security, was a practice little known or heard of; for, as I lately mentioned, land and its produce alone were the only objects of consideration with our forefathers. Personal debts, therefore, were contracted of necessity and not of choice. In the progress of things, the temptation of profit above what could be got by land, proved to be the only inducement to the trusting of money upon personal credit; and when the statutes restricted that profit, and defeated the devices of money lenders, the commerce of money was still more and more confined to the real security of land. At last commerce increased, and money became more plenty, the lenders rested satisfied with the interest allowed by law, and then, and not till then, the moveable bond became a deed common in practice; since that time, it has proved the mother of diligence real and personal, and consequently of the rights of property.

Sir Thomas Craig's celebrated treatise turns entirely upon feus or real property: Like the old English writers, seldom does he deign to mention moveables, and then no farther than as they relate to heritage. Sir Thomas Hope of Craigiehall, is the first of our lawyers who has left us any thing upon the present subject. His observations, which are commonly entitled *Minor Practics*, were composed about the year 1632, some time after the period when moveable bonds became common, and before our judges had settled the legal idea of their nature and effect. 'The distinction (says Sir Thomas) 'between heritable and moveable bonds, was of old thus: viz. A 'moveable bond was that which was made to the creditor by simple bond, for payment of money, at any term, with a penalty, and 'did not contain an obligation to invest in annualrent, nor to pay 'annualrent to the creditor, as well invest as not invest: And an 'heritable bond was, where the debtor sold lands, or annualrents 'out of his lands, under reversion of the principal sum which was  
' lent

'lent to him by the creditor; and also containing requisition of the debtor for payment of the principal sum, upon forty days warning, or more or fewer as the party pleased \*.' The first moveable bond then, made no mention of interest; the creditor depended entirely upon drawing his profit from the penalty, and more commonly from a pledge. Such was the practice of France at the very same period. Sir Robert Spottiswood has preserved a decision which marks this: 'A French bond bearing no annualrent, but only damage, if the sum be not paid at the day, resolveth even into the ordinary profits and annualrent, as being the custom of France. 6th March 1627, Roger Laurieton against Kenedy †.' Kings did not think it below them sometimes to pawn their jewels, and great men their plate, when they wanted ready cash. By a deed extant in Rymer's *Foedera*, it appears, that Henry VI. of England pawned his jewels to the Cardinal Bishop of Winton, for L. 4095, in the year 1434; and, for further security, granted him a bond for the money. In a small collection which goes under the name of Carruther's Styles, there is one of those old bonds mentioned by Sir Thomas Hope, which contains a depofite of gold coin by way of pledge ‡.

The bond is totally silent as to annualrent,—the hopes of the lender lay upon the pledge. Even in the days of James VI. after the exaction of interest had been authorised by act of Parliament, few or no loans were made upon bonds; for, if an annualrent happened to be expressly stipulated to be taken for the money, that circumstance of itself made the bond heritable. So much bigotted had the nation become to every thing that was feudal, that they would not allow that class of rights to suffer the least diminution. Annualrent had from the earliest times been purchased out of lands; these rights they had raised up to the title of feus; though Craig ob-

F 2

serves,

\* Minor Pract. p. 35.

† Spottif. Pract. p. 63.

‡ Carruther's Styles, p. 1.

serves, that they ought only to have been termed heritable servitudes: 'Potius haec servitutes haereditariae dici debeant, obtinuerint tamen ut haec etiam feuda dici possunt \*.' The reason why annualrents were always connected with lands, was evident; they could not legally be purchased in any other shape. The Legislature now allowed annualrent to be taken for a loan of money upon personal bond, independent of land. The judges opposed themselves to this national improvement, and would not suffer the least diminution of this species of feudal property; and therefore, they agreed to hold all money given out avowedly to return annualrent to the lender, to be heritable, and to descend to the heir in the same manner as if it had been secured upon land by infeftment. A stronger instance of the power of legal prejudice scarcely occurs in the history of the law; nor is there any case in which our jurisprudence took a course more directly opposite to that of England. Both nations meant to pay honours to the idol of feudalism. The English allowed nothing to approach it but what was completely of its own nature. They therefore sunk the chattles real into an inferior order. The Scots, on the contrary, exalted every thing into a feu; however defective, they appeared the same in essential requisites. Their annualrents payable out of land, turned *feoda pecuniae*, and the holder of it was dignified with no less than feudal honours; he was held to be a Baron, and died vested and seized as of fee. And, lastly, the bare interest of money, though not arising from land, was also forced upwards into the class of feudal property. They invented terms and reasons which had no real meaning; interest, they said, had a *tractum futuri temporis*; whatever a man gave out for time, could be intended only for his heir, &c. Lord Stair does not make a good excuse for this peculiarity; , The distinction of heritable and moveable (says his Lordship) is divided into 'rights and obligations, as the matter thereof is heritable or moveable,

\* Jus Feud. p. 82. §. 37.

‘ able, and so all dispositions or obligations for constituting any  
 ‘ right of the ground in property, commony or servitude are  
 ‘ heritable, although they have not yet attained their effect, and be-  
 ‘ come real rights complete; as dispositions of lands, annualrents,  
 ‘ pasturages, thirlage, &c. which is so far extended, that all which  
 ‘ is by destination to have its accomplishment, by a real right of the  
 ‘ ground, is heritable; as bonds bearing a clause of annualrent,  
 ‘ which because annualrents were usually by infeftment, therefore,  
 ‘ the very provision of annualrent, though but a personal oblige-  
 ‘ ment to pay it yearly or termly without mention of infeftment,  
 ‘ made the provision or bond heritable, and not to descend to exe-  
 ‘ cutors, children, or wives, but to heirs only \*.’

The judges in this matter are not without apology, nor was the point settled without a considerable struggle. We have seen that the first moveable bond consisted of no more than a simple obligation, for payment of a principal sum under a penalty. In fact, the people had no idea of giving a permanent loan upon that security. These obligations were not even termed bonds. In England they went under the name of *bills*, and in Scotland of *tickets*. This technical term in the law is now out of practice, and out of memory; but our statute-book, and the decisions of the last century, are full of regulations and questions about tickets. They were a kind of recognisances payable to the bearer. The Scottish ticket differs very little from the form of the old English bill: ‘ I  
 ‘ A. B. grant me to be justly addebted to C. D. in the sum of  
 ‘ three hundred pounds Scots, which I bind and oblige me, my  
 ‘ heirs, successors, and executors, to pay to the said C. D. his heirs,  
 ‘ or assignees, or any having his order, and that against the  
 ‘ day of                      next, under the penalty of fifty pounds Scots,  
 ‘ in case of failure. In witness whereof, &c.

This

\* Stair, p. 167.

This obligation was the forerunner both of our common bond, and of our inland bill, as we shall afterwards find.

The first effect of the legal toleration of annualrent was observable, not upon the bond or ticket, but upon the annualrent right. The creditors in these securities had formerly no title to call for the principal sum ; but now, when annualrents were become legal, the writers first ventured to annex a proviso : ‘ That the creditor might demand back the principal upon notice given, under form of instrument, forty days before ;’ and this was called the clause of requisition. The next improvement was to add a personal obligation for payment of the money ; though this obligation, by force of the clause of the registration, produced a charge against the debtor, upon ten or fifteen days, yet were the clauses of the requisition still retained, and the use of it was this. If the creditor meant to recover his money upon the personal obligation, he went on by registration and common diligence ; but, if he meant to attack the land of the debtor, by apprising or real diligence, then it behoved him, in the first place, to make requisition.

‘ An heritable bond (says Sir Thomas Hope) was when the debtor sold lands, or annualrent out of his lands, under reversion of the principal sum which was lent to him by the creditor ; and also containing requisition of the debtor, for payment of the principal sum, upon forty days warning, or more or fewer as the party pleased\*.’ In an action (says Sir Robert Spottiswood) pursued by the Laird of Clackmannan against Barrowney, the Lords found, ‘ That upon a bond bearing payment of a sum at a term, and in case of failzie of a penalty, together with an annualrent, the creditor might comprise at any time thereafter without requisition. July 1629.’

After this, the charge came in place of the requisition, and in all cases that ceremony fell into disuse. The next improvement was the

\* Minor Pract. p. 35.

‘ are made moveable at the pleasure of the creditor, without expressing any external act to distinguish whether it be heritable or moveable.’

‘ The Lords, in the decision of these points, have been very uncertain ; for sometimes they judged no bonds to be heritable, except they bear a clause to infeft : Otherways they found a bond heritable, without a clause of infeftment, if it bore an obligation to pay annualrent to the creditor, as well infeft, as not infeft ; and, lastly, they have found it heritable, albeit it want both clauses, if it bears an obligation to pay annualrent \*.’

To this last opinion, though erroneous in the extreme, the court firmly adhered, as appears by repeated decisions in *Durie*, which it is unnecessary to point out. At this period then, the mark of a moveable bond or ticket, was, that it obliged the debtor to pay the penalty, without mention of interest ; and the characteristic of an heritable bond was a stipulation for annualrent. I use the word heritable bond here, in its strict sense, *i. e.* as properly descendible to the heir without any relation to security upon land. But all heritable bonds had specific terms of payment. The law presumes, that it was the intention of the creditor to demand his money at that term ; and therefore, where such creditor died before the term of payment, the bond was deemed to be moveable, and fell to executors. On the other hand, where the term of payment was allowed to pass without such a demand, the presumption took place, that the money was meant to lie upon annualrent for behoof of the heir, the bond then became, properly speaking, heritable. When the creditor seriously chose to raise his money, he used a requisition or a charge, either of which positively declared his intention to recover his money ; and therefore, such a requisition or a charge, by the rules adopted in this matter, evidently made the contents of the bond moveable. The notions entertained by our judges, respecting  
the

\* *Minor Pract.* p. 36.

This statute takes no notice of the former act. That would have been doing too much honour to a rebellious assembly. However, it does this in effect; because it has a retrospect to the 1641, and confirms the intermediate effects of the first statute. From these acts we learn, that the former interpretation of the law respecting bonds with annualrent, had been practically introduced, previous to any of these regulations, by an express exclusion of the executor; and the same power is very properly reserved to those who choose to do so, as it was not the intention of the statute to restrict or confine the subjects, in the settlements of their private affairs.

It is only, then, since the 1641, that the writing now so common with us could have been termed, a moveable bond.

We are now arrived at the period when Mr Dallas of St Martin collected his system, *i. e.* about the year 1666. The first form he has given us is that of the *moveable bond*, which I shall now endeavour to analyse and explain.

‘ *I A. B. by thir presents, grant me to have borrowed and received from G. D. all and haill the sum of ——— usual Scots money.*’—The English recognisances, being public acts, begin with ‘Know all men;’ because they are addressed to every body, and all men were concerned in their effects upon the land of the debtor. The English bond is copied from the recognisance; but the simple obligation, bill, or *obligatio simplex*, without a penalty, not being intended to remain as a security longer than the term of payment, began, like our ticket, with the name of the granter, none but the parties being presumed to have any concern.

The Scottish moveable bond, or ticket, for the same reasons, began with the name of the granter, whereof there are several early instances. The Earl of Murray, Regent of Scotland, borrowed five thousand pounds from Elizabeth, to be applied towards the political purposes of the times. For this sum he granted a simple bond, which is dated the 18th day of January 1568. It mentions neither  
annualrent

annualrent nor penalty. It begins: 'We James Earl of Murray, 'Regent of the realm of Scotland, do grant and confess, by these 'presents, to have received, &c. ;' and he binds himself by the faith and truth of his body amply to content and repay the money.

'*All and haill the sum of.*'—The words *all and haill, totas et integras*, were invented when lands first came to be described in charters. I shall, in the proper place, mark out the particular period. Our writers, accustomed to these words in heritage, applied them to sums of money bearing annualrent, which were heritable,—*foeda pecuniae*; and therefore we find, All and Haill the sum of —, or, All and Haill the lands of —; but these words never were used in tickets, or moveable obligations. They are now mere tautological expletives, and have therefore been for a long time omitted in personal deeds, but continue to be used when the money is to be secured upon land.

'*Whereof I hold me well content, satisfied, and paid; and, for me, 'my heirs, and executors, exoner and discharge the said W. D. and all 'others whom it effeirs of the samen.*'—This, in the analysis of the bond, is termed the receipt of the money borrowed. But why should the borrower grant such a formal discharge to the lender, and declare himself satisfied and paid thereof? This form, singular in appearance, arises from a subtlety of the Roman law. A loan of any thing, for the purpose of being consumed and changed, was called a contract of *mutuum*; *mutui datio* was that, where money, grain, or any other fungible was lent by one man to another, on condition that the same quantity should be returned at a time certain. The borrower then became master of the thing given to him; he could use it in the same manner as the lender could have done. 'Inde etiam mutuum appellatum est,' say the Institutes, 'quia ita a me tibi datur, ut ex meo tuum fiat \*.' Hence our common word *mutual*, and *mutual* contract. This is distinguished from *commodatum*, where the thing lent must be preserved, and the *ipsum corpus* returned. *Mutuum* then being a contract,

\* Inst. §. 3. tit. 15.



the lender performs his part by delivering the money. The borrower acknowledges the receipt of it, and discharges the lender and his heirs of their part of the contract. It is a general rule, that the greatest number of the clauses in our deeds respecting moveables, are borrowed from the principles and practice of the civil Code; and those which regard our land rights, from the principles and practice of the feudal law. This form of receipt, or discharge, in our bonds, is still kept up for the sole purpose of expressing what we call the cause of granting, which, indeed, is not absolutely necessary; because it is presumed by the obligation to pay. No man would come under such an obligation, without a sufficient inductive cause for doing so. In separate bonds, however, the cause of granting should always be expressed. It stamps a character of plainness and integrity upon the transaction; and, in future questions, either with the party or his creditors, proves highly beneficial to the lender.

‘*Whom it effeirs of the samen.*’—The word *effeirs* is a common term in the law of Scotland, and continually occurring in our styles. In this place of the bond, it means, all whom it may concern. This word is said to be derived from an old French word, *affurer*, to tax or estimate; and thence came the old English word, *affeyers*, who, in the ancient courts, were persons appointed to fine jurymen, or others who refused or neglected to do their duty. ‘The amercement or fine of every juror,’ says the term *De la Ley*, ‘shall be affeired according to his offence; and where a town was fined, the *effeirance* was said to be general.’ The word came, therefore, to be used in two senses; the first to affirm, or confirm, because the jury fixed, or affirmed the fine, and in this sense it continued in England. As it related to proportion in the fine, we have retained it. In talking of interest, we say, ‘such annualrent as shall *effeir* to such a sum.’ Others derive it from the French word *affaire*, which means a process, a piece of business, a concern of any kind. *Affairé* is a person full of business. In the old Scotch language we called it *affeir*,  
and

and in the law language, *effeir*, to be concerned with, to correspond, or relate to; and, therefore, *in form as effeirs*, means in such form as in law belongs to the thing. Both these etymologies may be just.

‘*Renouncing the exception of not numerat money, and all other exceptions and objections of the law what/soever, that may be proponed or alledged on the contrary, by thir presents for now and ever.*’—

In the old bond, brought by the Italian merchants to England near five hundred years before the date of the deed we are talking of, there is an express renunciation of the exceptions that might be drawn from the civil and canon laws, and all other exceptions that could be made against the debt. The bond by James I. in the 1424, contains a renunciation of all the Roman exceptions then known; and among the rest, the exception of not numerat money. At that time, the renunciation was by much the longest clause in the deed. All these vanished by degrees, leaving the single exception, *non numeratae pecuniae*, which remained for a long time in every country where the Roman law was received. It relates to the case where an acknowledgment is taken from a man without delivering him the sum mentioned, by number or count, which the contract of *mutuum* obliged the lender to do. The writing (say the civilians) produces an action at law; but natural equity furnished the defender with the exception, *non numeratae pecuniae*, in order to defeat the action. When this exception was made, it behoved the lender to prove the delivery of the sum. This power of excepting, was, by the Roman law, restricted to two years; but, when a man granted a discharge for a sum of money, the circumstance was more favourable, and the granter was allowed no more than thirty days to complain of the not having received numerated money. I assigned one reason already for the solemnity of discharging the creditor; but here we find another, and a stronger one. The exception of not numerate money operated but a very short time against a discharge; for which reason, the borrower is made to discharge the lender. To

convert

convert a lender into a debtor, and a borrower into a creditor, merely, by a form, was (with deference to the learned civilians) unquestionably *fraudem facere legi*; yet our bonds at this moment retain, in their form, an evident vestige of this evasion. Since the law furnished such an exception, the renunciation of it seems to have been but a very poor device. If the law supposed that the creditor in the bond had got hold of the deed, without paying the money, the same supposition must have also applied to the renunciation; and therefore the defence militated as strongly as ever.

This exception of the civil law was antiently received all over France, and it must have also been received in Scotland; but now the French have rejected it. An authentic deed with them is evidence complete, upon condition that it mentions the receipt of the specific sum; but if it does not mention it, then the exception of not numerat money is still received in the southern provinces, where the Roman Code is acknowledged as the proper law of the country. With us, these things are now of little consequence; the exception, *non numeratae pecuniae*, has no force. The acknowledgment of the debt, as in England, is sufficient; though the cause of granting should seldom or never be omitted.

The receipt for the money being given with a discharge to the lender, and the civil law exceptions renounced, the lender's part of the contract of *mutuum* is complete. The borrower now proceeds to his own part of the business, *i. e.* to oblige himself for the repayment.

' Which sum of — money foresaid, as principal, with the annual-rent thereof to the term of payment underwritten, I, as principal, and C. D. as cautioner, suretie, and full debtor, for and with me, by thir presents, bind and oblige us conjunctly and severally, our heirs, executors, and successors, and intromitters, &c. whatsoever, thankfully to refund, content, pay, and deliver again to the said G. D. his heirs, executors, or assignees.'—Here the debtor engages to pay back the money, with the annualrent from the date of the bond

bond to the term of payment. We have heard the reason why moveable bonds were generally made payable at short terms ; the money was intended to be recovered at that time, or the interest depended upon the penalty being soon incurred, and the debtor rendered tractable by having a demand for the whole sum pendent over him. He obliges himself, his heirs, executors, and successors, and intromitters, &c.; under the, &c. are to be understood, his lands, goods, and gear whatsoever. By successors, are meant those who may succeed in virtue of a disposition. Successors relate to the lands, and intromitters relate to moveables, and those who meddle with them without a title. The order of the words should be heirs and successors, executors and intromitters. This anxious specification was of old not without a meaning. Obligations by the civil law received a strict literal interpretation ; and the distinction of heritable and moveable affected the creditor as well as the debtor. The succession of the latter divided into heritage and moveables. The moveables were liable for the moveable debts, and the heritage for the heritable debts ; and, consequently, the executor stood answerable for the former. Afterwards the whole debts seem to have been thrown upon the executor ; and the heir was not obliged to answer till the moveables were discussed. This defence was removed by the 76. act of the 6. parliament of James IV. 1503, which will come to be fully examined in another place. I shall only point out the following authority from Sir Thomas Hope, which relates to the present subject. ‘ The executor is liable to the payment of ‘ moveable debts, and of old could not be pursued for heritable ‘ bonds ; but now the Lords promiscuously sustain process against ‘ the executors and intromitters, as well for heritable as moveable ‘ bonds ; and that without discussing of the heir ; whereas the heir ‘ is not conveyable for moveable sums, *nisi post annum* after the de- ‘ funct’s decease, albeit he be already entered heir \*.’ To avoid these distinctions, and render the recovery of the debt plain and easy,

\* Page 37.

easy, it was natural for the writers to make sure work by binding all the different successors known in the law. In the 1708, a bond appeared in court, where a man bound only his heirs and executors, but not himself. It was objected, that the bond was null; because, by an express title of the Roman law, all obligations behaved to begin at the person of the granter, otherwise '*nec profunt nec obfunt haeredibus.*' This subtlety was rejected, and the bond sustained. Indeed it had been so by the later constitutions of the Roman law itself; 21. January 1708, Lord Grange against John Hamilton \*.

I shall reserve what I have to say upon cautioners or co-obligants, until the simple bond be discussed.

'*Thankfully to refund, content, pay, and deliver again.*'—Here is a string of synonymous terms. The immoderate use of words to the same purpose, in the clauses of deeds, is not imputable to our predecessors, the lay clerks; but, as I observed before, it is entirely owing to the clerical notaries of the fourteenth century. The practice, however, is not entirely destitute of use. One word of stronger signification assists another of weaker import; or, if one should happen to be blotted, or erased by accident, the other stands good of itself. At the same time, I shall never contend for such a clutter of words as are found in this old bond; modern practice has reduced them to two, and so it is right they should remain.

'*To the said G. D. his heirs, executors, and assignees.*'—The destination to the heirs of the creditor is a most material part of the bond. Even here, the bond was anciently supposed to require a literal interpretation, and that the obligation went no farther than the express words. It is an established point, that, where an obligation or other deed is granted to a man himself, though his heirs be not mentioned, it is understood to be granted to his heirs also, unless they shall be expressly excluded; and it is this declaration or exclusion, which it is our business to attend to in cases of that kind:

'Heirs

\* Fount. Dec.

‘Heirs (says Lord Stair) have right not only to obligations conceived in favours of the defunct, and his heirs, but though there be no mention of heirs, unless by the nature of the obligation there be a specialty appropriating the same to the person of the defunct, only as in commissions, trusts,’ &c \*. The word, *heir*, in a moveable bond, is not to be taken in the usual acceptation; it is nothing more than a different term for executor: ‘Executor haeres in mobilibus dicitur (says Craig) is enim ex testamento vel ab intestato succedit.’ Hence though a bond be taken to heirs alone, without mention of executors, it would go *haeredi in mobilibus*; and consequently, when taken to heirs, executors, and assignees, as in the case before us, the money goes to the executor. It was the act in the year 1661, which ultimately fixed that point, by declaring that all bonds shall be moveable, where executors are not expressly excluded. The word *heir* therefore was proper, before the date of that act, when bonds bearing annualrent were heritable; and, when the executor had only a small chance of the succession; but since the date of that act, it is no better than an expletive, which writers have kept in from mere custom, without any meaning. Where executors are excluded, then the word *heir* assumes its proper meaning.

‘Betwixt the date hereof, and the feast and term of next to come, but longer delay, fraud, or guile, with the sum of money foresaid, of liquidate expences, in case of failzie or registration of thir presents in our default; together with the ordinar annualrent and profit of the said principal sum, conform to act of Parliament, and that yearly, termly, and continually, during the not payment thereof after the said term.’—The purpose of making short terms of payment, was of old to insure the interest in the name of damages out of the penalty. The law of this country soon suggested another reason for doing so. The moveables of debtors were carried by

Vol. I.

H

priority

\* Stair, p. 474. § 5.

priority of diligence ; and therefore, long terms of payment were, and still continue to be, dangerous and inconvenient. According to our present practice, bonds for borrowed money are always made payable at the next term after the loan, which is generally about three months. Six months is the longest term I have observed, excepting in special transactions, and by particular agreement. According to the interpretation of the law, the words ‘ betwixt and a certain term ’ include the term day ; and therefore, in this, and all other cases of the kind, the term day must elapse before any penalty be incurred, or diligence proceed.

‘ *But longer delay, fraud, or guile, with the sum of L. money, foresaid, of liquidate expences in case of faillie.* ’—The words *fraud* or *guile* used here, are not in our styles synonymous, or relative to the delay. They relate to the duty of the borrower in the contract of *mutuum* prescribed by the civil law. The penalty is not only to be incurred by delay of payment, but by the borrower attempting any deceit or evasion in the performance of his obligation ; and, though we have now omitted these words, the law retains the construction, and applies the penalty to the indemnification of the other party, against whom any injustice has been done, or attempted to be done. ‘ If any party has disadvantage (says Lord Stair) by fraud or guile, it ought to be repaired, not by virtue of the contract, but by the obligation arising from that delinquence ; and so unjust balances are an abomination to the Lord because of the deceit thence arising \*. ’ Our old writers chose to provide against the fraud and guile in the obligation itself.

‘ *With the sum of of liquidate penalty, in case of faillie.* ’—It was mentioned before, that the Romans, in order to avoid the trouble of a judicial liquidation of damages, were accustomed to fix upon a certain sum to be paid in case of non-performance ; and to do this they were encouraged by the law : ‘ In ejus modi

\* Stair, p. 104. § 15.

\* *modi stipulationibus* (says the text) *commodius est certam summam comprehendere, quoniam plerumque difficilis probatio est quanti cujusque interfit.* Money being in place of all things capable of being estimated, the sum fixed is termed liquid penalty. When the annualrents depended on the damages afforded by these penalties, the quantum, like the English bonds, was sometimes taken at double the principal sum, and always large; but, after the legal toleration of annualrents, the penalty could only relate to the expence of enforcing the payment; and, therefore, the court considered them not as a real estimate of damage, but as a precaution to ensure performance of the obligation: Therefore they restricted the damages to the real expences, except in the cases of apprising and adjudication, where the creditor was obliged to take his payment in a manner quite contrary to his intention, and, perhaps, to his conveniency. It also behoved him to be at considerable expence in obtaining his real diligence; and therefore, to shorten the matter, the Lords allowed him the sum agreed upon in his bond of liquidate expences.

In St Martin's bond, no mention is made of a fifth part, the sum is blank, and were we to examine the bonds and contracts of the seventeenth century, we would find the quantum of the penalty differ in almost every one of them; sometimes it is less than a fifth part, and sometimes it is more; many instances occur in the decisions of that period. In the bond, No. 2. of Carruther's Styles, the penalty of five hundred merks is no more than sixty; and, in the case Halkerston against Cadie, 1st February 1628, the Lords sustained a bond, having forty merks of penalty, for L. 80 of principal\*. In the 1672, the old diligence of apprising gave way to the form of adjudication, in consequence of the 19th act of the 3d session of the second Parliament of Charles II. One of the complaints against the old apprising was, the heaping up of penalties and sheriff's fees. It was therefore ordained, that the Lords should adjudge to the credi-

H 2

tor,

\* Durie, p. 335.



tor, such a part of the debtor's estate, as should be worth the principal and annualrents then resting; and a fifth part more, in respect the creditor wanted the use of his money, and was obliged to take land for it. This fifth part appeared to Parliament to be evidently an average of the former penalties, and was given in lieu of expences and sheriff's fees. The writers naturally adopted this proportion; and, in the present century, the fifth part of the principal sum came to be the practical penalty in all obligations for payment of money, and continues to be so at this moment, though it is not fixed by any law or stated rule. These conventional penalties being evidently of that class, which the Roman Magistrates were accustomed to reduce to the real damages of the party, the Courts of Equity in England followed their example in the case of the double bonds; and our Court of Session, exercising the mixed power of law and equity, have made penalties the subject of what is termed the *nobile officium* of the Court. Lord Stair expresses himself upon this subject, in a plain perspicuous manner: 'The Lords of Session' (says he) 'modify exorbitant penalties in bonds and contracts, even though they bear the name of liquidate expences, with consent of parties; which necessitous debtors yield to. These the Lords retrench to the real expences and damages of parties. Yet these clauses have this effect, that the Lords take slender probation of the true expences, and do not consider whether they were unnecessary or not. So that they exceeded not the sum agreed upon; whereas, in other cases, they allow no expences but what is necessary or profitable \*.'

But, though the Court interpose in modifying penalties, they positively refuse to adject one where it is omitted: The following decision will properly illustrate this point: An assignee to a bond of six thousand merks adjudged the estate of his debtor; but, when he came to extract his decret, he found no penalty liquidated in his bond.

\* Stair, p. 571.

improperly transplanted by the conveyancers out of the annualrent right into the personal bond ; and contributed to fix the judgment of the Court, destinating these last to the heir. It was thought that a stipulation for annualrent after the term of payment, rendered this bond also a pure annualrent-right, or more properly converted it into a perpetual annuity ; and therefore, the money is declared payable at any other term or time, notwithstanding of the clause anent payment of annualrents ; by which is meant the annualrents after the term of payment, not before it ; when the personal obligation was first added to the old heritable bond, then, if the term of payment had been allowed to pass, and annualrent happened to be received thereafter, that receipt of annualrent prevented the personal charge. Requisition must have been used, in order to raise the money, and therefore, the words ‘ without any premonition or requisition to be made by them to that effect’, are understood as an addition to the clause, and were generally added at that time\*.

Having endeavoured to give the history of the common bond, down to the old form given us by St Martin, and having explained the parts of that form, I now proceed to the few posterior laws which were made relative to the present subject, since the days of Mr Dallas to the present times. The English bills, the foreign obligations, and the Scottish tickets, had frequently of old been made payable to the bearer *latori præsentium*. The words of the Scottish tickets were : ‘ To pay to the said C. D. his heirs or assignees, or any having his order, on demand.’ For a long period, discharges in separate deeds were little known or practised. The terms of the ground of debt rendered it unnecessary, being payable to the bearer. The possession of the writ itself presumed the payment in the literal meaning of that axiom of the civil law : ‘ *Chirographum apud debitorem repertum præsумitur solutum.*’ Accordingly we find, that, in order to prevent disputes, debtors were often taken bound to pay the

\* Vide Dallas’s Styles, p. 798.

the money upon no evidence or no pretence, but the delivery of the principal obligation itself. The clause used upon these occasions was generally conceived in the following words: ‘ Promittentes nos  
‘ non probare solutionem aut liberationem hujusmodi debiti, nisi per  
‘ præsentes literas, incisas vel cancellatas.’

The escheats or forfeitures of the moveable goods of individuals, so frequent and so distressing among our forefathers, together with the embarrassments occasioned by the private prohibitory diligences of inhibitions, arrestments, &c. put the ingenuity of the people to work to discover means of defeating the effects of these legal evils. The most effectual method, devised for the purpose, proved to be the execution and delivery of bonds blank in the creditor’s name; which, like the old tickets to the bearer, went from hand to hand, without bearing a trace of their transmission; and consequently, eluded the effects of diligence of all kinds. This practice, it seems, increased with the internal commerce of the country, and grew up to a dangerous length towards the end of the seventeenth century. In England, the attornies, for a very long period, have kept bonds printed or engraved. They contain all the words of style, excepting the names of the parties, sums, and dates, which are filled up at the time of execution; and, even then, the person who fills them up is not with them designed. I have not been able to learn that any custom took place of delivering blank bonds; for they neither had the inhibition nor arrestment to fear; and, with respect to the forfeiture of moveables, it had been for ages confined to the criminal law alone.

So soon as this practice came to be abused, the Court bent their attention to prevent it. Lord Stair tells us, ‘ That the first instance  
‘ which occurred to the Lords, was upon the 11th November 1665,  
‘ when they found, That the delivery of a blank bond was in fact  
‘ an assignation of it; and, as it did not appear at what time the  
‘ name of the creditor had been filled up, they preferred the ar-  
‘ rest.—Telford against Veitch.’

A practice of this kind, aided by the ingenuity of the people, proved an over match for the accidental checks given to it by the judges. The abuses multiplied; and the Courts were filled with intricate questions, created by blank writs. Parliament therefore interposed by the act, dated the 9th of October 1696\*.

The names of the parties ought, in every case, to be fully inserted by the same hand that writes the deed. If it is subscribed blank in the name of the creditor, the error is incapable of being supplied, and the bond is null. The allowance that the act gives, is, That if a party do happen to sign a deed before the name of the creditor is filled up, the name must be inserted before delivery, in presence of the same persons who had witnessed his subscription.

This act banished blank bonds and other writs of that kind out of our practice. It has been literally and properly executed by the Courts of law; and is seldom or never disobeyed in practice. A bond or other deed may be justly suspected upon this account: When the name of the creditor appears to have been filled up with a different hand, and different ink from the body of the deed; but this may happen in consequence of the words of the act of Parliament, which permits the name to be inserted at the time of the subscription and delivery; and therefore, that circumstance does not bring the deed under the act, unless it can be also proved that it had been omitted at the time of the execution, and supplied either after delivery, or in the absence of the witnesses †.

The next law which concerns our subject, is the 12th of Queen Anne, c. 15. which reduces the rate of interest to 5 *per cent.* and discharges any greater profit to be taken, under the pain of nullity of the deed, and forfeiture of treble the value of the sum lent.

By a clause of the same act, ‘ all scriveners, brokers, and solicitors in money affairs, are discharged from taking any reward or  
‘ brokerage

\* 3d Sess. 1st Parl. Will. vol. iii. c. 25.

† Erskine's Inst. p. 428.

‘ brokerage for procuring the loans of money, or forbearing the  
 ‘ same, over and above the rate of five shillings for the loan or *for-*  
 ‘ *bearing* of L. 100 for a year, and so rateably, or for 12 pence  
 ‘ over and above the stamp duties for making any bond or bill re-  
 ‘ garding the premises.’

To this last part of the act, we, in Scotland, have never paid any regard, judging the proviso to be entirely levelled against the innumerable corruptions of money broking in England. We know little of them in this part of the island, and I hope we never shall.

This is the last law or statute which regards the present subject; and by it I am naturally led to say a few words upon our own method in the management of the money business, which has always been a branch of the profession of a Writer. There is no country in Europe, where money can be so constantly and conveniently disposed of as in Scotland. If it is meant to remain unapplied, or invested only for a short time, the banker’s house is open to receive it, and to pay, formerly *4 per cent.* and now *3 per cent.* of interest. The bankers in England never do this; they will receive and safely keep money, but they give nothing for it in the mean time. When money is to be lent upon bond or security in London, the broker must be paid for finding out the security; and if money is wanted to borrow, the broker must be doubly paid for discovering the lender; for, as this commerce has become the province of a particular set of men, their abilities have proved an overmatch for the statute of Queen Anne. In this country, the agents of the lenders and the borrowers settle the business together. It is the privilege of the doer for the lender to write the bond, because it is the lender who is to be satisfied, with regard to its sufficiency. The borrower pays for it, because the transaction takes its rise from his necessity. The English statute allows only a shilling to be taken above the stamp duties, but it allows five shillings *per hundred*, or, as the merchants say, a quart *per cent.* for the brokerage or agency. This appears to be little; but then it will be observed, that it allows it to be taken

each year for forbearance ; and thereby tolerates a constant oppression. I am informed many people are glad to pay the five shillings yearly, as regularly as they do the L. 5. We acknowledge no such practice ; our payment is made at once, under the name of writing the bond. These payments are not limited by any regulation, but bear a proportion to the quantum of the sum lent.

The circumstance of printing the bonds brought down the fees of them in England to the petty rate of a shilling. Trading people keep them in the same manner as they now do stamps for bills.

It is proper to notice in this place, that the second clause of the act of Queen Anne extends to us in Scotland : Were any dispute then to occur about the payment of a bond, the quart *per cent.* and the shilling are the legal standards. I hope it will not happen, and that we shall never know any thing of demands for forbearance of money : They would be attended with a total corruption of our manner in this business.

The generality of Writers make no demand upon their employers for lending their money, though I have met with it stated and paid upon several occasions. Their profits then depend upon writing the bond ; and it would be reckoned mean and disgraceful in any man, to use ways and means to bring about the changing of money from one hand to another, without good reasons. If it be no more than to get the writing of a new bond, he sinks into a broker, as mean and contemptible as any in Change Alley.

The form of the bond remained with very little variation or abridgment, till within these twenty or thirty years past. By degrees, however, a number of the redundant words fell, and at last settled in the following style :

‘ I A. B. writer in Edinburgh, grant me to have instantly borrowed and actually received from C. D. writer there, the sum  
 ‘ of one hundred pounds Sterling ; which sum of one hundred  
 ‘ pounds, with the legal annual rent thereof, from the date of  
 ‘ these presents to the term of payment after specified, I bind and  
 ‘ oblige

‘ oblige me, my heirs, executors, and successors whatever, to repay  
 ‘ and deliver again to the said C. D. his heirs, executors, or assignees  
 ‘ whatever ; and that at the term of Martinmas next ; with a  
 ‘ fifth part more of liquidated penalty in case of failure ; and the due  
 ‘ and ordinary annual rent of the said principal sum, from and after  
 ‘ the said term, so long as the said sum shall remain unpaid. Con-  
 ‘ senting,’ &c.

This is a plain form from which little or nothing can be taken, when the bond is separately written. Young men are often taught to make divisions and subdivisions of its substance, which is of no manner of use. The farthest I would carry it is, divide the bond into two, first the receipt of the money, and secondly, the obligation to repay it with interest at the term fixed, under a penalty.

The receipt of the money is a remainder of the old Roman form, founded upon the contract of *mutuum*, which, though not absolutely necessary, is, as I said before, convenient, and often proves advantageous. Some people still use the words, ‘ renouncing all exceptions on the contrary ;’ which is a very curious relic of the ancient style. For into this short phrase, the long renunciations of the civil law exceptions, introduced many hundreds of years ago, is now entirely shrunk : We found it in the bonds in the beginning of the thirteenth century ; and the ghost of it still remains in this phrase.

Mr Spottiswood the Professor of Scots law, at the beginning of this century, is the only person who has, since the days of Dallas, published any system of our personal forms. After giving the style of a bond differing little from that of Dallas, he adds, ‘ but, because this form may be thought to contain clauses unnecessary and superfluous, though in daily practice, I give a bond in a more compendious style.’

‘ I A. oblige me and my successors to pay at Whitsunday next to  
 ‘ B. his heirs or assignees, the sum of L. 1000 Scots, of borrowed  
 ‘ money,

‘ money, under the penalty of L. 100 pounds, with the ordinary  
 ‘ annualrent of the said principal sum, from the date hereof, during  
 ‘ the not payment.’

In this form the substance is sacrificed to brevity, which very seldom happens in legal writings. It is highly exceptionable, in so far as the debtor is not obliged to pay interest from the date to the term of payment, as usual, he is only bound to pay it as a penalty ; so that, were he to pay the money at the precise term, he might dispute the intermediate interest upon the same principle, as he might refuse the penalty itself ; *ex contractu*, no interest is due, but in the event of incurring the failure. This faulty model has been pretty much followed ; at least, I have of late years seen many such bonds, especially in mixed deeds. I do not say that they would, *de facto*, be attended with the effect mentioned. Equity and the plain intention of parties might perhaps get the better of the construction. The trial of the point would be dangerous to the lender, and would bring into hazard the character of the Writer, as a man of business.

From the commentary I have given, upon the simplest of all our securities, the moveable bond, we may perceive with what care and nice attention to the principles of the law and state of society, every word and clause of this established style has been originally composed. We will have the same observations to make upon many others, and therefore, cannot be too careful in preserving and adhering to them in the course of our profession. So material did this matter appear to the Court, that one of the first things done at the meeting of every Session, was to recommend this to the body of the Writers, who were obliged to attend for the purpose ; and I am told that this practice continued down to the 1745. Of late years, it is not uncommon to hear gentlemen avow a fixed disrespect for the forms and manners of our ancestors, both in conveyances and  
 judicial



judicial proceedings, they talk of substituting their own good sense for style, and for doing business in forms of their own. If there is no information, no science peculiar to practitioners, if we are to destroy the system of practical jurisprudence, which the learning and long experience of our ancestors have transmitted to us, our title to a separate profession ought to accompany its fall. Every man may draw deeds as he pleases, and do business according to his own fancy; our manners then will corrupt the law by continued relaxation in favour of error, and the law must consequently corrupt the manners of practitioners, by repeated indulgences of their mistakes. Our approved styles are daily vanishing, and those clauses and terms to which the experience of ages have affixed a certain interpretation, are giving place to affected, equivocal, and too often to ungrammatical modes of expression. From these, among other causes, many of our profession of late years have sunk into an absolute dependence upon the gentlemen of the bar, and are obliged to have recourse to them for their assistance in matters of business, which the bar ought to learn from them, and which it is a shame for Writers not to know. By this means they depress their own importance, and multiply the expence of their employers. In the course of this undertaking, I shall have many striking and melancholy instances to give of professional errors and absurdities in business, which have been occasioned by the absolute ignorance of some, and the presumption of others, in venturing to substitute their own sense, and lame mode of expression, for the wisdom of ages. The more a man knows, his confidence in what I may term his innate powers, will lessen in proportion; in place of venturing upon novelties, and disregarding experience, he will learn to trust to nothing but a solid knowledge of the principles and established forms of business; and he will find, that to acquire these with certainty and pleasure, it is indispensibly necessary to trace the subjects of our profession through the different periods and changes they have undergone,

dergone, and to be able to compare our present with our former practice.

Before dismissing the subject of the bond, I have judged it necessary to take notice of some peculiarities, which most commonly occur in that article of business. It often happens, that the money is advanced some time before the date of the bond; and therefore, to keep the words to the real fact, the bond mentions this circumstance in these terms: 'I A. B. writer in Edinburgh, grant me to have borrowed and actually received, at the term of Candlemas last, notwithstanding of the date of these presents, from C. D. sum of one hundred pounds, with the legal annualrent thereof, from the said term of Candlemas last,' &c.

This article of practice is of considerable standing. From a decision reported by Forbes\*, 7th November 1711, Scott against Baillie, it appears, that a declaration of this kind had at that time been long in use. It is now become absolutely necessary.

Where the bond is granted for a debt already contracted, if there is more than a year's interest, it may be added to the principal, or, what is better, paid up to the date of the bond, because it is at that time exigible; but, if there be less than a year's interest, it ought not to be added, because it is properly not due, interest being only annually paid; the best and plainest method is to declare the fact in the bond, and to take the debtor bound from the term of the real advance or date of the debt.

A bond granted for debt already contracted, is evidently of the nature of a recognisance; and, in place of using the English words, 'am held and firmly bound,' we use the equivalent expression grant me to be justly addebted and owing,' &c.

When bonds are granted by men of landed property, who are necessarily parties to family settlements, it is usual to take their success

\* Forbes, p. 537.

cessors bound, according to the specific enumeration of the law : ‘ I  
 ‘ bind and oblige me and my heirs, as well male as of line, tailzie,  
 ‘ conquest, provision, and all others my successors, executors, and  
 ‘ intromitters with my goods and gear whatsoever, conjunctly and  
 ‘ severally, renouncing the benefit of the order of discussing them.’

The complete explanation of this clause would open a very wide field, and carry us too far from our present subject : I shall at present simply define these several heirs, account for the necessity of binding them, and speak to the privilege of discussion which is renounced.

An heir of line is a direct descendent from the party, such as sons, daughters, grandchildren, &c. These are also called heirs-general, because they not only generally and necessarily represent the party in the common course of things ; but every property in general, belonging to the predecessor, goes to them, which is not otherwise specially disposed of. The heir male is so termed, because a female is supposed to exist in a nearer degree of propinquity, to whom he is preferred in consequence of a destination exclusive of females. This was the first and most antient step to our present entails, and hence it is, that the bond takes in the heirs as well male as of line. This phrase though twisted, as it were, in appearance, is exceedingly proper ; the heir-male, as succeeding to the capital property, is put first in order, and at the same time the natural and more close relation of the other duly marked.

The heir of tailzie succeeds not by law, but in virtue of a special deed ; under that denomination, he is generally at a greater distance than the heir-male ; and, as the line of propinquity is cut in his favour, he is therefore called the heir of tailzie, from the French verb *tailler* to cut.

The heir of conquest can only succeed to a middle brother, or the son of the middle brother, who stood between two uncles. He is the elder brother, and succeeds to every thing conquest, *i. e.* acquired or purchased by his immediate younger brother, because by

the law such conquest ascends ; and the immediate younger brother is the heir of line to whatever property descended to the defunct from the common predecessor, for by law heritage descends. The heir of conquest then necessarily supposes an heir of line to exist ; and it also supposes two several estates to have belonged to the defunct, one ascending and the other descending.

An heir of provision is generally a son or daughter of a second marriage, who stands provided to certain sums or properties, in virtue of the contracts or settlements made by their parents ; but whatever relations succeed in consequence of any special deed made in their favour, are termed heirs of provision, though they be not children of the marriage.

Of these heirs none succeed by law, but the heirs of line and of conquest. The heirs-male, tailzie, and provision, as before observed, succeed only to special properties by virtue of particular deeds ; and even of these last, some are nearer in point of propinquity ; for the heir-male, or the heir of marriage, must be nearer in blood than the heir of tailzie, who is often a remote kinsman, and sometimes no relation at all ; and hence these heirs became entitled, in our law, to what is termed, the *bond of discussion*, which they were allowed to propone by way of exception, against the suit of the predecessor's creditors. Though the Roman law knew no such successors, yet this exception or benefit is directly borrowed from the analogy of other discussions established by that law. The civil law, in favour of cautioners, obliged the creditor to discuss the principal debtor as a preliminary to an action against his surety ; and it also forced the creditor to sue each of the securities for their share in proportion, which was called the *beneficium divisionis*. From the analogy of these rules, a like exception or benefit of discussion was admitted into Scotland, in favour of heirs. Our law, once the same with that of England, subjected the heir to the heritable debts alone, and the executor to the moveable debts. We have heard in what manner that came to be altered, and all heirs subjected to the debts

debts of their predecessor; the only remainder of their privileges, is that of the discussion, to which they were entitled in the following order, which is concisely set down in Mr Erskine's small Institute.

' The heir of line is primarily liable for the debts of his predecessor; for he is the most proper heir, and so must be discussed by creditors, before any other can be pursued. Next to him the heir of conquest, because he also succeeds to the *universitas* of the whole heritable rights which his predecessor had acquired by singular titles. Then the heir-male or of a marriage, for their propinquity of blood subjects them more directly than any other heir of tailzie, who is a stranger, and who for that reason is not liable till all the rest be discussed, unless for such of the predecessor's debts or deeds, as relate specially to the lands tailzied, as to which he is liable even before the heir of line\*.'

To avoid all inconveniency in the recovery of the money, the clause binds all those different successors without distinction, and makes the granter renounce the benefit of discussing them in order. When the municipal jurisprudence of modern Europe found itself over-run with exceptions and defences furnished from that quarter, the remedy universally applied, was that of renunciation. The renouncing clause was the longest in the old deeds, examples of which we had in the antient bonds formerly noticed. The same method was followed by the Writers, to get quit of this Scottish defence, for so I may term it, of the benefit of discussion.

The general definition of discussion, as applied by the law of Scotland to the case of heirs, is understood to be execution by horning and caption against their personal effects, and adjudication against their heritage.—Durie, 22d March 1627, Edgar.

So much for the heirs of the granter of the bond. With respect to the heirs of the creditor, I have formerly shewn the import of that destination, the clause by which executors are excluded, and

K 2.

the

\* Erskine's Inst. p. 371.

the money destined to the heir. Some people carry this so far, that they not only exclude executors from the principal sum, but also from the whole annualrents falling due thereon, and penalty incurred through failure. By this means, the bond for borrowed money is rendered more determinately heritable, than either land or ties upon land. For the rents of land and bygone annualrents upon heritable bonds, always go to executors. Common heritable bonds go to executors, if the creditor shall die before the term of payment, but bonds secluding executors do not; they are heritable *a principio*.—Fountainhall, 5th November 1587, Muir against Muir. They continue heritable through successions of heirs, till the destination be altered by a special deed, but this cannot be done upon death-bed.—12th January 1725, Kames's remarkable decisions, p. 141.

Bonds are but seldom taken from one person, two or more generally join in them, either as principals equally concerned in the loan, or as sureties for a principal. I am to speak of these cases in their order. When people borrow money together, the loan is divided equally between them. The law presumes that it is so; and therefore, each party is only liable for their proportion of the debt. The rules for the regulation of this matter, have been entirely borrowed from the Roman law. Co-obligants in that jurisprudence were termed *correi debendi seu promittendi*. Antiently, I mean among the Romans, it was held that all co-obligants in a debt were liable *in solidum*, although they engaged by separate obligations: Nay, although they were bound to pay at different times, yet the delay competent to the one afforded no defence to the other, who stood simply bound; if the one happened to be absent or bankrupt, it followed that the other must have paid for him.

The Emperor Adrian introduced the benefit of division, in order to mitigate this unreasonable law. The creditor was thereby obliged to sue each debtor for his share or proportion. To get the better of this, the debtors were all taken bound *in solidum*; but Justinian extended the law of his predecessors even to that case, so that thereafter

after it required an exprefs declaration or ftipulation to make co-obligants bound. Thefe rules were adopted every where with the civil law and the phrafe choſen for the purpoſe was, *conjunctim et diviſim*, and in France *conjointement et ſeparément*; in England, *joint and ſeveral*, and with us, *conjunctly* and *ſeverally*. The word *conjunctly* imports, that all the debtors may be profecuted together; and the other, that each of them may be ſued ſingly for the whole. If then they are only *conjunctly* bound, all of them behaved, *de facto*, to be purſued, the omiſſion of one would afford an objection, and each is only liable for his own ſhare; or, according to the Roman idea, he would be entitled to the *beneficium diviſionis*; but, if they were bound *ſeverally*, then each is ſingly bound, and may be purſued for the whole; ſo that, of the two words, *ſeverally* is the moſt important. Both of them are uſed together, and always reach the effect intended. We are ſo habituated to theſe words *conjunctly* and *ſeverally*, as almoſt never to diſjoin them in idea. Indeed, when two perſons are bound together to do any thing, they are in fact *conjunctly* bound, without the addition of the word: Thus, where two people obliged themſelves to a third party to deliver a powder mill or pay 500 merks, the Lords found, that the obligation divided, in reſpect the price was diviſible, becauſe the obligants were not bound *conjunctly* and *ſeverally*.—Urie againſt Skene, January 20. 1630.

The obligants in bonds are oftener cautioners or ſureties for the principal party, than concerned in the loan; and the benefit of diſcuſſion was firſt introduced in favour of the cautioner. The antient Roman law made no diſtinction between the co-obligant and the cautioner; the creditor might either attack him or the principal, as he pleaſed. The law of the Emperor Adrian gave them the ſame privilege, as the co-obligants, *i. e.* the *beneficium diviſionis*, by which each of them could be purſued *pro rata portione*. Juſtinian next beſtowed upon them *beneficium ordinis*, *i. e.* the benefit of *diſcuſſion*, which rendered them only ſubſidiarily liable, after  
the

the property of the debtor had been discussed. The generality of the privileges, benefits, and exceptions of the Roman law, might have been renounced by the persons entitled to them; and it was not long before the cautioners were not only regularly obliged by the notaries to renounce these privileges, but also to declare themselves to be principals or full debtors, and to be bound conjunctly and severally.

So soon as money came to be lent upon personal security, both in England and Scotland, cautioners were demanded in lieu of the former land security. In St Martin's time, the method was not only to take the cautioner avowedly bound in that character, but also to make him a principal in the matter of obligation. The words of our old bond are,

*'I as principal, and C. D. as cautioner, souertie, and full debtor, for and with me, by thir presents, bind us conjunctly and severally.'*

—And the same deed frugally contains a bond of relief by the debtor, to indemnify his cautioner, so that St Martin's moveable bond contains two distinct obligations.

*'Full debtor with and for me.'*—These words added to *cautioner* and *surety*, made a very complete obligation, exclusive both of the Roman benefits, and of division, and discussion. As cautioner and surety, it bound the party for the whole sum; he could not therefore be a co-obligant; as full debtor, he stood also in place of a co-obligant *in solidum*; and therefore, was not entitled to the benefit of discussion. The bond therefore contains no renunciation of it. I shall support this construction by decisions. An heir being pursued upon a bond in which his father was bound as cautioner and full debtor, to pay the sum, alledged that he could only be liable for the half, because the bond wanted conjunctly and severally: The Lords repelled the alledgeance; and found him also liable to pay the whole sum without division, seeing the principal was bound in the whole, and he was his cautioner; and the tenor of the bond bore, that they were bound as full debtors, which the  
 ' Lords



\* Lords found to oblige each one of them, and their heirs, *in solidum*, for the whole.—L. Cloverhill against Ladiland, 26th January 1631 \*.

The same words, as I have said, import a renunciation of the benefit of discussion, so the Court found in July 1665. A cautioner bound as full debtor, claimed in a suspension the *beneficium discussionis*, because he had not obliged himself conjunctly and severally. The Lords found, that the words, 'full debtor,' imported and implied a renunciation of the cautioner's privilege.—Dunbar against the Earl of Dundee †. These decisions precede the date of the bond we are talking of, and demonstrate the attention which the men of business of that period paid to the progress of the law, and the determinations of the Supreme Court.

To these authorities I beg leave to add the argument of a later decision, because it goes into a proper and perspicuous examination of the words of style under discussion. Five persons joined in a bond for a sum of money, as co-principals and full debtors,—two of them died insolvent,—other two paid the money,—and sued the representatives of the third for three-fifths of the sum, in respect of the failure of the other two co-obligants. The defender, a female representative, objected, 'That she could only be liable *pro rata* for a fifth share of the debt, her husband being but one of five *correi debendi*, who were not bound conjunctly and severally, but as co-principals and full debtors.—Replied, Full debtors are debtors *in solidum*, or *in totum*, in contradistinction to partial debtors, or debtors in part, and *qui totum dicit, nihil exceptit*. Therefore the *correi*, being bound as full debtors, were all liable to the creditor *in solidum*, as if they had been bound conjunctly and severally, and as if they had expressly renounced the benefit of division.—Duplied for the defender, The ordinary clauses of style, whereof the due observance is sessionly recommended to the writers by the  
 ' Lords,

\* Durie.

† Gilmer's Decisions, p. 114.

‘ Lords, are not to be supplied by equivalents ; and our law knows  
 ‘ no other clause, importing debtors to be liable *in solidum*, than  
 ‘ when they are bound *conjunctly* and *severally* ; nor can the words  
 ‘ *full debtors* import any more, than that all are jointly debtors for the  
 ‘ sum ; as if they had granted a receipt of all and haill a certain  
 ‘ sum, and bound themselves to repay the said haill or full sum.  
 ‘ The Lords found that the debtors in the bond were all liable to  
 ‘ the creditor *in solidum* ; but that the defender would have been  
 ‘ liable in a fifth only for the pursuers relief, had all the *correi* been  
 ‘ solvent. But two of them being bankrupt, the defender was  
 ‘ found liable in a third share of the debt, December 26th 1707,  
 ‘ John Cleghorn, &c. against Yeton \*.’

A cautioner by our common law, is not entitled to relief, until he is distressed for the debt, *i. e.* charged for payment ; but, when the cautioner stood bound in this manner, the registration of the bond was found to be sufficient. This registration against himself as a co-obligant, gave the cautioner an opportunity of taking out another extract, in order to do diligence upon the bond of relief ; but in this matter, an alteration soon took place, which it is now proper to take notice of, because a considerable variation, both in the writs and mode of the business, was thereby created.

The miseries which individuals have, in all ages, brought upon themselves and their families, by entering into cautionary engagements for others, and the reluctance which is felt by the Judges in awarding the execution of the law against people in that unhappy situation, has at all times, and in all countries, inclined the Legislature to try preventative remedies against the practice ; and to promulgate laws for alleviating the situation of the cautioner. In this spirit, the Roman privileges of division, discussion, &c. were introduced by the Emperors, but without effect. The cautioner was  
 ‘ either reduced to renounce the privilege, or to bind himself as a  
 ‘ principal,

\* Forbes's Decisions, p. 212.

principal, which rendered his situation, *de facto*, worse than before.

The strict manner in which cautioners were taken bound in our bonds for borrowed money, and the mischiefs which it brought upon them, called the attention of Parliament, and produced the act of the 1st Parliament of William, c. 5\*. which very much resembles the novel of Justinian upon the same subject. It declares, that though a man be bound *for* and *with* another, *conjunctly* and *severally*, he shall notwithstanding remain bound only for seven years; introducing thereby a prescription of the cautionary obligation. The benefit, however, was to fall to those only who either had an obligation of relief in the principal bond, or a separate bond intimated to the creditor. Now, let us attend to the consequences of this act, gracious in its intendment, and plausible in its means. From that time forward, no lender would accept of any person in the quality of a cautioner; nor would he allow a clause of relief to enter into his bond. Writers insisted, that every person concerned should be taken bound in the same terms as the principal, *i. e.* by the same words, and without the least distinction. Far less would they admit of the clause of relief, whereby the situation of the parties might be discovered, and the prescription of the act become current for the cautioner. From this time forward, then, all bonds for borrowed money were taken from the granters, *conjunctly* and *severally*. The lender chooses to be kept in a convenient ignorance of the situation of his parties, and to leave them to settle that matter among themselves. For the same reason, the old words, *full debtor for* and *with*, have been omitted out of all common bonds; because they have the appearance of pointing out a distinction between the parties. Separate bonds of relief, therefore, are always taken from the principal, or the person for whose behoof the money is borrowed. The Legislature foresaw that cautioners would be thus con-

VOL. I.

I.

verted

\* Vol. iii. p. 396.

verted into principals, and that separate bonds would be taken ; and it was imagined, that the effect of this would be checked, by directing the separate bonds to be intimated, but this idea failed upon trial. A co-obligant who should intimate his bond of relief at the date of the loan, would do little or no favour to his friend. It would prove no other than a notice to the creditor, to recal the money, as soon as it could be done with decency ; and he would give this very act of intimation, as his reason for doing so. The intimation of the bond at any more distant period, is just to call a demand of the money upon a man's self ; and therefore, if he is uneasy about the circumstances of the principal debtor, he chooses to insist for his relief in quietness, without alarming the creditor in the debt.

Thus, like the laws of the Emperors, the act of King William has afforded no relief in the matter of cautionry by the common bond, nay, it has suffered a prejudice by it. In the old bonds, such as have been the subject of this commentary, the cautioners appear avowedly in that character ; and, therefore, the favour of it everywhere attended them ; whereas the distinction of principal and cautioner is not now attended to. The bond is silent upon that circumstance ; and diligence often proceeds without the least respect of persons.

Mr Spottiswood, in his first chapter upon bonds, has touched upon a great variety, which go under that common denomination, though in themselves totally unconnected ; such as bonds of provision to children, bonds by minors, tutors, married persons, bonds of pension, &c. ; these belong to separate branches of business, which are distinct and irreconcilable to each other. This is the effect of the order in our style-books, which I have used the freedom to find fault with, viz. the method of classing our deeds under general titles, in contradiction to the order of actual practice, and to the line of business we every day see passing under our eye. I shall now conclude my observations on the moveable bond, with the only remaining cases, viz. ' the lending money, and taking bonds from  
' societies.

‘ societies public and private.’ In the hands of the former, some people choose to place their money in preference to all others; and, in the present state of commerce, the stock of private companies is often partly raised upon the credit of their partners. A corporation or body politic was by the Romans styled *collegium* or *universitas*. ‘ It is composed (says Mr Erskine) of a number of men united or ‘ erected by proper authority, into a body politic, to endure in continual succession; as appears most suitable to the nature of that ‘ special community, and most necessary for answering the purposes ‘ intended by it. Cities, boroughs, and hospitals, &c. may be thus ‘ incorporated; and we have frequent instances of lesser corporations within greater. Thus, in most of the cities and boroughs of ‘ the kingdom, we see wrights, weavers, merchants, &c. incorporated with certain rights and franchises granted to each of ‘ them \*.’

The essential characteristics of these political bodies, are, that they are held to be persons capable of suing or being sued, purchasing or selling, and consequently of holding property in the same manner as any individual could do. Another essential is, that being created for the benefit of the kingdom, they are perpetual. This kind of perpetuity can only be attained by succession; and that succession must necessarily arise from admission of new members. The principal matter of the constitution of these societies, is the appointment of particular officers, for the administration of their affairs, who act in a body, and whose deeds bind the corporation or community in the same manner as the deeds of a private person bind the individual. Every corporation or body politic, then, has a particular constitution, with a set of rules and formalities peculiar to itself. It is the magistrates for the time, and the established officers for the trade, who act for, and bind their respective communities. In particular, they are entitled to borrow money, and to grant bonds,

L 2

which

\* Erskine's Inst. p. 148.

which affect the funds of the society, in the same manner as the obligations of a private person affect his estate.

The acts and deeds of administrators of corporations are always presumed to be done for the benefit of the body politic. In order to insure this, they pass under certain previous formalities. The most ancient and curious obligation I have met with, was granted by the town of Dundee for the ransom of James I. \*

This

\* This bond contains a distinct recital of the treaty for the ransom, and the securities to be given therefor by the towns of Edinburgh, Dundee, Perth, and Aberdeen, after which it proceeds in these words :

‘ We therefore, the Provost and Bailies of the said Burgh of Dundee, and Community of the same, being assembled, as use is, at the sound of the bell, within our common court-house, for the special purposes after expressed : Considering that the liberation of our Lord the King is not only most desirable to ourselves, but would be most joyful to the whole Kingdom of Scotland, who have been in the highest expectation of his arrival and good government, these many days.—Therefore, in order that the said treaty and appointment may be effectually performed and fulfilled, we, by the consent and pleasure of our Lord the King, of our own accord, and in truth, in our own name, and in the name of all and singular our community, acknowledge and declare, that if the said Lord James our King, shall not at the time and place pay and perform in the precise terms of the said appointment and treaty ; then, and in that case, we bind and oblige us, and our successors to the said King of England, his heirs and successors, in the sum of fifty thousand merks, good and lawful money of England ; which sum of fifty thousand merks, we and each of us, for ourselves, and our several heirs and successors, *in solidum*, and likewise in name and place of all and singular our community, in case of the non-payment and performance aforesaid ; bind and oblige us well and truly to pay to the said Henry King of England, and his heirs and successors, or to their certain attorney, bearer of these letters, or of transumps thereof, within the church of St Paul of London, in England, within a month to be computed from the term or time in which our said James shall fail in payment or performance of the treaty before recited ; and that without any farther delay.—Moreover, we will and grant by these presents, for us and our successors, that the said Henry King of England, his heir, or any successor to him whatsoever, shall have power to call and convene us and our successors, and every one of us, *in solidum* ; and which ever of us he may choose in vice and place of our community, and our said community itself, before any court, or judge, ecclesiastical, or secular, for payment of the aforesaid sum,

‘ either

This bond is written in Latin, as grammatical and as pure as the subject could possibly admit of, and the translation now given is almost literal; it fully justifies what I have observed, respecting the revolution of the style of personal writs, which took place in the fourteenth century, upon the prevalence of the Roman law. It is a bond of cautionry,—it is a bond by a community; and I may venture to affirm, that there is not a clause used in any one of our similar obligations, which is not to be found here, expressed in a manner which seems to exclude the possibility of equivocation; and that all the bonds of cautionry, and all the bonds by communities, or private persons, which are now known, or have been known for centuries past, seem to be no other than skeletons, carved out of this gigantic form.

For

‘ either in whole or in part; also that the receipt of a part of the said debt, from any  
 ‘ one or more of us, either in judgment or without the same, shall in no shape prejudice  
 ‘ the said King of England, or prevent him from demanding, or recovering from us,  
 ‘ or the remainder of us, at his own pleasure, both principal and interest, *in solidum*;  
 ‘ promising at the same time, that we shall not prove payment or liberation from the  
 ‘ same debt, in any other manner, than by production of these present letters cut or  
 ‘ cancelled, or by discharge past under the Great Seal of England: And for the pay-  
 ‘ ment aforesaid, and the faithful and perfect performance of the premises, we oblige  
 ‘ us and each one of us, principally and *in solidum*, in name and vice of our foresaid com-  
 ‘ munity; our said community itself, and all our own proper goods, and the goods of  
 ‘ the community aforesaid, present and to come, in whatever places or countries the  
 ‘ same are situated or are to be found; renouncing the exception of *rei non sic gestae*,  
 ‘ (*i. e.* of a false or erroneous recital; the benefits of lacion, restitution, and circum-  
 ‘ vention, the aid of the laws canon and civil, and of all statutes, consuetudes, privi-  
 ‘ leges, or pretences, whereby this general renunciation may be hurt or invalidated,  
 ‘ together with all other exceptions, allegations, or defences, which can be objected,  
 ‘ or opposed against these present letters, or the contents thereof.—In faith and testi-  
 ‘ mony of all which, we have caused the Seal of the Community to be appended to  
 ‘ these presents; at the Burgh of Dundee aforesaid, upon the 20th day of February  
 ‘ 1423.’

\* Rymer's Foedera, vol. x. p. 344.

For example, the English were not satisfied with taking the community or town of Dundee bound for the debt, but they take each one of the magistrates, and their heirs, as private persons, conjunctly and severally, *principaliter* and *in solidum*. They take the goods of the community, real and personal, future and to come, hypothecated for the security; and lest, a payment of a part by any of the individuals, should entitle them to the benefit of division given by the civil law, the solidity of the obligation is anxiously preserved by a particular clause for the purpose, so that each person stands bound until the last merk be paid. The execution of this bond is a formal act of the corporation assembled in the town-house at the sound of the bell; and such is the case at this moment, in almost all the boroughs of Scotland.

As these formalities were necessary, and as the obligants were intrusted with the performance of them, they are made to renounce the power of denying the *res gestae*, and all other exceptions of the law, canon and civil. Our predecessors the Writers misplaced this clause in the bond. After renouncing the exception of not-numerated money, they added the general words, 'and all other objections or exceptions that can be proponed on the contrary;' but this applied only to the receipt of the money, whereas by the old method of concluding with the renouncing clause, it was made to apply to all the parts of the obligation preceding. In other deeds, we have preserved this renunciation in its proper place, as I shall have occasion afterwards to notice. This bond was executed by appending the seal of the town, which is the hand of the artificial body politic; and though seals have in all other cases given way to subscription, they still remain with the borough, and in many cases are applied to their antient use.

This old corporation bond will make the modern one easy of conception. It had long been the established custom of corporations of all kinds, either to declare the purpose for which money was borrowed in the deed itself, or to get an act of the body passed  
and



and recorded, to authorise the ordinary officers to procure the loan. This arose from the prescription of the Roman law, from which we have our ideas of the *universitas* or corporation. They considered the political body as a kind of minor under curators, whose administrators must shew every thing to be applied to the real advantage of the minor, or the society. This caution was observable in the very ancient bond brought by the Italians to England in the twelfth century. The loan was made to a convent, and the members declare, 'That it was applied to the real utility and advantage of their society.' Now, we have the same declaration in the form of a corporation bond, given us by St Martin \*; the words are: 'Fore- asmeikle as A. C. his majesties master slater has at our earnest request paid and delivered to us, towards the furnishing and providing of our new mercat place in the Canongate, in timber and slate, visibly tending to the perpetual being and subsistence of our calling; all and haill, the sum of,' &c. This striking resemblance between two deeds executed at the distance of more than five hundred years, demonstrates that both have been dictated by the same law, and the same principles.

The expression of the purposes of application was often long, and appeared not pertinent to the deeds of third parties; and, therefore, as I mentioned before, separate acts were extracted and delivered to the lender, in order to prove his *bona fides*, i. e. that he considered himself as lending for the good of the society; and also to authorise the ordinary officers to grant the bond. The managers of corporations very often omitted the usual formalities, especially when they had any private or sinister plan to carry on. The bad effects of this became general and visible, especially in the royal boroughs, in so much that an act was made in that behalf, in the 1st Parliament of William and Mary, 1693, c. 28. The penalties of this act are entirely pointed against the magistrates, who shall neglect the formalities;

\* Dallas, p. 707.

lities thereby prescribed to them. The private party is kept entirely clear, and it is just and right that it should be so. X

Since the date of this statute, however, it has been the constant practice for people who lend money, not only to royal boroughs, but to corporations of all kinds, to demand an act of the society, declaring the purpose or intended application of the loan, and authorising their officers to grant bond for it. Independent of the act of Parliament, this formality never should be receded from; it has a distinct and important use. As each borough or society has its own constitution, a stranger may be uncertain of the number or quality of the officers who are entitled to bind it. Now, a previous act by the whole members of the society, removes all difficulties upon this head, and renders the execution of the bond by the persons authorised equivalent to an execution by the whole members of the society.

The next question goes to the effect of this species of obligation. In general, then, it may be observed, that bonds by magistrates or other officers of bodies politic, bind only the bodies politic themselves, and the proper estate and effects belonging to it. They bind also the present administrators personally, during the subsistence of their office, and their successors in that office; nay, the diligence against the one set of magistrates or officers, may be executed against their successors without renovation; so the Lords found in the case of the Laird of Drumlanrig against the Baillies of Hawick, 15th January 1624\*. It is eligible in all cases of this kind, to take the magistrates or administrators bound, not only as representing their community, but personally as private individuals. The cities and considerable towns of the country, who have a large and sufficient common good, never submit to this, excepting in particular exigencies, or when they borrow from the public banks. The lesser boroughs often

\* Durie, p. 97.

X In loans & securities, it is material to enquire if their grants of constitution empower them to borrow money - No 26 of Run Du -

often do it, and no doubt where double security of this kind can be had, it is a desirable circumstance for the lender ; particular attention, however, must be paid to the conception of the bond to bring about this effect. In a case of the town of Culrofs, the question was, if the creditor in the bond followed the public faith of the town in accepting this security ; or, if it was the meaning of the parties to bind the subscribers personally, or their heirs, seeing it obliged them to pay it conjunctly and severally. The Lords having read the bond, found, ‘ That it bore to be for the town’s use, and ‘ that they were designed as magistrates, and obliged themselves ‘ and successors in office, and they being now *functi* and exau- ‘ rated, they found it only obliged the town, and not them.—Feb- ‘ ruary 1695, Bowie against Wilson \*.’

In a late case, however, of the magistrates of Pittenweem, more attention was paid upon the part of the creditor ; the money was lent by Mr George Innes of the Royal Bank, but not (says the reporter of the case) till after ‘ the proper acts of council were ‘ made to subject the community for the money borrowed.’ The granters of the bond as individuals, and their successors in office were both charged. The former contended, that they ought not to be bound as private parties ; and the latter consigned a disposition of the common good, and contended, that the effect of the charge against them could go no farther, than to compel them to make payment out of the funds of the corporation, as to which they were already discharged by consignment of the disposition. But to this reasoning the Lords paid no regard ; they found the letters orderly proceeded.—July 20. 1752, Cleland against Magistrates of Pittenweem †.

About the beginning of this century, the citizens of Edinburgh were very fond of lending their money to subaltern corporations of tradesmen, in preference to private people. Several of them abused

VOL. I.

M

their

\* Fountainhall, vol. i. p. 667.

† Kilkerran, p. 132.

their credit ; failed for large sums of money ; and ruined their creditors. Since that time, few of the corporations have been trusted, unless the officers and members bound themselves as individuals.

In Royal boroughs, bonds for borrowed money are generally granted by the provost, where there is such an officer, baillies, dean of guild, &c. treasurer, and town-council, or such a number of the latter as are authorised by an act of the whole. The bond recites the previous act of council, and then the several obligants under their respective designations, as representing the whole body and community of the borough, bind and oblige themselves and their successors in office to repay the money. In corporations, the ordinary officers are the deacons, the box-master, and quarter-masters ; and bonds are granted by them, and as many of the members as are agreed upon. The bond by these petty bodies, in analogy to the act 1693, recites a previous act of the society. The receipt is granted for the use and behoof of it ; and the obligants bind themselves, and their successors in office, and the remanent members of the corporation, for the payment.

When the individuals of these societies are taken separately bound, it must be done in distinct and unequivocal words, such as these : ‘ As also, we the said A, B, C, D, &c. bind and oblige ourselves as individuals, in our private capacities, conjunctly and severally, and our respective heirs, executors, and successors, to make payment,’ &c.

When corporations lend money, the bonds are taken payable to ‘ the treasurer of the town, or to the box-master of the society, and to their successors in office, for the use and behoof of the community.’ If, in either case, it is necessary to know the number and power of the officers of these bodies, the best method is to procure from the clerk, an extract of their last election, from which every article of information can be got. In lending money to public trading companies, we must be ruled by the patents or acts of Parliament by which they were constituted, and in private copartnerships

ships by their contracts. I have lately seen instances of partners subscribing obligations by the firm of their company. This is a novel, and not a commendable practice. A number of difficulties might be suggested, which would attend a deed of that kind, when made the foundation of legal diligence. The practice is purely mercantile, and ought to be confined to bills. In bonds, and solemn deeds, it is the business of the writer to design each one of the partners as an individual. To declare that they are partners in company, under the firm and title in which they go, to bind them for that company, and for themselves, conjunctly and severally; and to make each of them subscribe in his usual manner.

---

### *Clause of Registration.*

**N**O circumstance distinguishes the jurisprudence of Scotland from the other European nations more, than their early invention of public registers, and the perfection to which the use of them has at last been carried; all our writers on the law have plumed themselves upon this circumstance, and recommended the improvement to their neighbours: ‘Some inventions (says Sir George M’Kenzie) flourish more in one country than another, nature allowing no universal excellency; and God designing to gratify every country he hath created; so Scotland hath above all other nations, by a serious and long experience, obviated all fraud by their public registers.’ I quote this from a paper written by Sir George, in answer to a discourse published in England against the introduction of registers into that country \*. The author of this pamphlet, contemptuously derives the registration of our moveable bonds from the Italian brokers of the twelfth century. These usurers, it seems, kept a kind of register of their loans, and the circumstances of the people with whom they dealt, as a directory to their brethren and successors in the art of imposition. Other English writers imagined, that the idea was derived to us from a similar practice in the Apostolic Chamber, in the reign of Henry III.; and others from a general register actually established by Richard I. appointing entries to be made of all mortgages given to Jews. Here the invention appears to have been put in actual practice; and it is matter of great surprise,

\* Philips on Registers.

surprise, that registers were not thenceforth established in England. Sir George M'Kenzie is very much offended, that the institution, which he thinks has been bestowed by a favourable Providence upon Scotland, should be made to flow from such corrupt sources. He is willing to derive his favourite custom from any origin but those pointed at by his antagonists, and the most honourable he could find was that of the Roman law. With respect to the registration of personal deeds in Scotland, our worthy countryman and his opponents are equally in the wrong. From a superficial view of the subject, they agree in confounding two things entirely different in their origin,—in their intendment,—and in their nature; for no other reason than because time and practice brought these things at last to a resemblance, and applied the common term of *registration* to both. There never was a register of moveable bonds, or other personal obligatory deeds, deliberately contrived or established in Scotland, either for preservation or publication to the world. The deeds went to the record of our courts, as the foundation of regular decrees, in the same manner as they do in England, and all other countries in Europe. These decrees, by means of the mandates of consent, or registration, turned at last into a mere form or fiction of the law. And, in proportion as the decree turned fictitious, the business assumed the new form of a register, an effect never intended or foreseen by our remote ancestors. This matter, of consequence, is totally distinct from the registers, which are peculiar to our country, contrived for the purpose, and established by acts of Parliament; such as those of reversions, feifins, inhibitions, &c. All these took effect at once, and were directly intended for the purposes of preservation and publication. The other kind changed by very slow degrees; and did not assume its present shape, but by force of progressive laws, made in the course of ages. Sir George M'Kenzie, therefore, had he considered the subject, would have had a short and decisive answer to make to his English opponents; who, in attacking him upon the subject of our registration of personal bonds,

only:

only betrayed their ignorance of the laws and forms of their own country.

It was a part of the Saxon polity, to have their civil business executed in the county courts. These courts had the advantage of being both civil and spiritual; the sheriff and the bishop acted as judges, and the inferior clergy as clerks. When any transaction was to be done between private parties, they repaired to the court, where it was executed in presence of the judge; and a memorial or account of the particulars was entered in the cartulary of the monastery next adjacent. Matters of consequence between great men were sometimes written in the blank leaves of church Bibles; and held to be the most authentic and unexceptionable of records. This mode of executing private business, before unexceptionable witnesses, was admirable both for its simplicity and effect. It excluded all disputes between the parties concerned, by establishing the matter of fact to a degree incapable of contradiction. In doing this, the civil and ecclesiastical powers aided one another. In matters of religion, the bishop, or his commissary, was judge, and the sheriff his assistant. If the delinquent disregarded the censures of the church, the sheriff enforced the sentence by imprisonment. In temporal offences, the sheriff was the judge, and the bishop gave him advice, and enforced the sentence by ecclesiastical censures.

The Norman conquest ruined in a great measure the Saxon constitution, and forced the feudal law upon the nation. William and his sons, though sworn to observe the Saxon laws, did all in their power to extirpate every trace of them. They introduced the Norman language, and Norman forms of procedure, into the courts,—they destroyed the union of the secular and ecclesiastical jurisdictions, which had preserved the peace of the country, and the independence of individuals. A number of the Saxon forms and solemnities, however, either survived the Norman violence, or were afterwards



afterwards restored ; such as fines, recoveries, &c. which were no other than the agreements of private parties, executed in the face of a court, and entered upon the record. The general maxim too, respecting the effect of such transactions by record remained, and remains to this day. It is a settled rule, says Judge Blackstone, ‘ That nothing shall be averred against a record, nor ‘ shall any plea, or even proof, be admitted to the contrary ; ‘ and, if the existence of a record be denied, it shall be tried ‘ by nothing but itself, *i. e.* upon the bare inspection, whether ‘ there be any such record or not ; else there would be no end of ‘ disputes \*.’

In the spirit of these maxims, lineally derived from the Saxon constitution, Edward I. the Justinian of England, obtained the Statute Merchant, which provides : ‘ That in every city, or great town, ‘ there should be kept a recognisance of debts due to merchants ; ‘ and that, in case payment was not made, upon complaint of the ‘ merchant, and inspection of the record, his body might be imprisoned, and his estate delivered into the possession of the merchant, according to a reasonable extent or valuation.’ After this, several other acts passed, establishing recognisances in favour of different ranks of creditors, who were all, in virtue of this statute, entitled to certain privileges and benefits.

As it behoved the parties in every case to appear personally, in order to make the acknowledgement ; and, as the force of the deed lay upon its being made a matter of record, the advantages of the statutory recognisance were, by an obvious and easy device, extended to common bonds. The original and real solemnities of court are, in this business, kept up. An action must be brought by the plaintiff ; and, lest that should go for default, there must be an appearance of an attorney for the other party, who is not only to state no defence, but to confess the debt, in order that judgment may go out against

\* Vol. iii. p. 24.

against the defender. By this means, however, the direction of the business is entirely committed to the creditor, who enters up the bond, as it is termed, for the same reasons as we register ours; but the effect is very different: ‘Lands (says the new abridgement of the English law) are bound from the time of the judgment; so that execution may be of these, though the party aliens *bona fide* before execution is sued out. So of statutes, merchant, staple, and recognisances, which also bind the lands, from the time of entering into them.’ From these forms of the law of England, it is Lord Kames’s opinion, that our mode of registration arose. ‘A deed (says his Lordship) has sprung from the recognisance which requires peculiar attention.’ In England, it is termed a bond in judgment, and with us a bond registerable. ‘With respect to the evidence of English bonds in judgment, (continues his Lordship) and Scottish bonds having a clause of registration, there appears no difference; they bear full faith, and, without any extraneous evidence, are a sufficient foundation for execution\*.’

Although our clause of registration bears a striking analogy to the warrant for confessing judgment in England, and though there are words in St Martin’s bond, which seem to support Lord Kames’s idea of the one being borrowed from the other; I mean the clause which mentions the penalty being incurred upon registration on the debtor’s default; yet, from a close comparison of the progress of the law of both countries, I remain perfectly satisfied, that our mandates for registration are of higher antiquity than their warrants to confess judgment, as some of our registers, properly so termed, are much older than any of the kind in England; and it is not at all improbable, that the practice in both countries arose from the same source.

I beg

\* Law Tracts, p. 77.

I beg leave here to observe a circumstance, which, upon inquiry, will be found to be literally true.—It is, That however the styles and forms of the English common law writs may be found to vary from ours, after the middle of the fifteenth century downwards, yet the public deeds of their notaries, their forms in chancery, and their ecclesiastical writings, without exception, differ almost in nothing from those either of Scotland, or of France. The reason was, that after the separation of the ecclesiastical and laic jurisdictions, each of these adopted different laws, and different forms. The former adopted the Roman law, and the ecclesiastical forms, which had spread from Rome, all over Europe, while the courts of common law, jealous of their rights, adhered to the antient maxims of the nation, and to the literal forms of their municipal jurisprudence. The civilians struggled to establish their system, and the others held them off with determined firmness. In all state affairs and public deeds, however, the forms of the civilians prevailed, and that from a reason of necessity. None other would have been intelligible; and hence it was, that the antient bonds relative to the ransom of James I. are composed in the language and the forms of the civil law, without a perceptible relation to the common law of England. This Roman style in the matters of treaties, contracts, instruments, &c. became, after the thirteenth century, so universal over all Europe, and the styles and forms of all churchmen became so uniform, that there is no mark in the order, or solemnities, by which we can distinguish a Spanish public instrument from a French one, or a French one from a Scottish or English. The very attest or docquet of the notaries, the ‘*Et ego vero,*’ &c. was used in the identical words in every kingdom of Europe, just as exact as it is now among ourselves. At the arrival of James I. in Scotland, a great part of our antient laws and forms remained; but, by the influence and prejudices of the ecclesiastics, who ruled both church and state, they gave way by degrees to the civil law,—to foreign feudalism,—and the forms of the conti-

ment. The institution of the College of Justice by James V. completed the revolution. This general observation kept in remembrance, will explain a number of circumstances in our progress through the unexplored periods of the history of our law.

It was mentioned, that, according to the antient Saxon constitution, the bishop and the sheriff aided one another in the administration of justice; but, after the separation of the ecclesiastical and secular jurisdictions, a competition took place between them, for the business of the nation; in which the churchmen prevailed almost every where, excepting in England, where the courts of common law stood out against them. In cases where the clergy could not directly claim the cognisance of a point, they prevailed with the parties to submit the matter to their determination; and we are informed by the learned Benedictines, the authors of the late admirable work upon antient diplomas, that these references were almost the only methods of terminating disputes in France, before the study of the Roman law became universal. Lord Kames's conjecture, therefore, is historically true: 'That in difficult or intricate cases, it was an early  
' practice for judges to interpose, by pressing a transaction between  
' the parties: Of which (continues his Lordship) we have some in-  
' stances in the Court of Session, not far back. This practice  
' brought about many agreements between litigants, which were al-  
' ways recorded in the court where the process depended. The re-  
' cord was complete evidence of the fact, and, if either party broke  
' the concord or agreement, a decree went out against him  
' without other proof\*.' But there was another and still more ef-  
fectual method, by which the ecclesiastical courts monopolised the  
national business; notaries, in all their obligations and contracts, ei-  
ther inserted a solemn oath of performance by the party, or made  
them swear to do so, and took a separate instrument upon the oath.  
This brought the matter directly under the ecclesiastical jurisdic-  
tion;

\* Law Tracts, p. 65.

Non; for, upon breach of the contract, the party applied to the church courts, who excommunicated the debtor, and held him so, until he paid or performed. At last the debtors were made to consent to their own excommunication, in the same manner as they do at this moment, that letters of horning may pass against them. Private people submitted themselves in this manner to the bishops of the dioceses, or any others agreed upon; princes and great men to the Pope. The forms of these deeds of consent are exceedingly curious, and have, without a doubt, led the way to our clauses of registration. There is one of them published by the ingenious Monsieur Le Moin, among the other formulas in his *Diplomatique Pratique*: It is a tack granted by the Officiality of Toul, of a farm in July 1439; the tenants swear to pay the rent, and grant a hypothec upon their whole property in security. They renounce the exceptions of the civil law, and the deed concludes with the following clause: ‘*Insuper dicti debitores, quod nos ipsos per defectum dictae solutionis, per excommunicationis sententiam, compellere faciamus, si necesse fuerit, se et sua, quoniam ad hoc jurisdictioni et compulsioni curiae nostrae supponentes, ubicumque se duxerunt, transferendum; et hoc medio tempore per canonicam monitionem contra excurrenti; qui quidem debitores de eorum consensu moniti fuerunt vivae vocis oraculo per dictum notarium de dicto debito, prout in terminis est divisum persolvendum, quod nisi facerent, voluerunt, quod pro quolibet termino sententiam excommunicationis incurrere absque alia monitione sibi in posterum ab hoc facienda. Quare vobis, qui super hoc a latore praesentium fueritis requisiti, praeciπendo mandamus, quatenus auctoritate nostra dictis terminis praelibatis aut uno eorum, ipsos quos nos ex tunc in his scriptis excommunicamus excommunicatos, publice nuncietis, usque ad satisfactionem praemissorum condignam \*.*’

N 2.

The

The same precise and terrible mode of procedure was universal in Scotland. The clause and precept were the warrants of the letters of excommunication; we term them letters of cursing, which, in Scotland, were almost the only compulstors for ages.

Princes, as I just mentioned, submitted themselves to the Pope. We may remember the clause in James I.'s bond, which I remarked might be termed the clause of registration of the times: 'And we hereby submit and subject ourselves, our heirs, and successors, to the coercions, forms, statutes, compulsions, and consuetudes of the chamber of our Lord the Pope, his auditors, vice-auditors, or other courts, ecclesiastical or secular, in which these present obligatory letters, or true or authentic transsumpts thereof, may be produced,' &c. Lewis XII. of France, became indebted to that royal money broker Henry VII. of England, in the large sum of 74,000 crowns. Lewis not only granted a complete and formal bond, upon the 4th of July 1498, binding himself by every tie divine and human, but Henry further obliged him to procure, at his own expence, a bull of excommunication from the Pope, in order to insure and enforce the payment. The bull of excommunication was accordingly procured and delivered; it is published in Mr Rymer's invaluable collection.

These were the clauses of registration, known among our ancestors, and such were the executorials which issued upon them. Our letters of horning are innocent weapons in comparison with bulls of excommunication, or letters of cursing; and yet we should deem it an unpardonable act of oppression, to oblige a debtor to raise and deliver diligence against himself; but there was a reason for this; letters of cursing could be issued before the term of payment, because they were conditional, and directed against the soul and conscience. Unless, therefore, a real failure or breach of oath took place, the parties could not be cursed by the letters.

Of



Of old, there was no execution against the person for payment of debt; the only method of obtaining that advantage against the debtor, was to make him conform to the solemnities I have mentioned, *i. e.* to submit to the direct jurisdiction of the church courts, and to consent to his own excommunication. If the letters of cursing were accordingly issued against him, and he continued forty days without giving obedience; or, as the churchmen said, obstinate and unrepentant, then letters of caption were issued against him at the King's instance, not upon account of his failure in payment or performance of his contract, but for his wicked and horrible contempt of the censures of the Church.

We have an early act of Parliament in behalf of this matter, *viz.* c. 12. of the 6th Parliament of James II. Sir George M'Kenzie has taken no notice of this act, though extremely interesting to the history of our law. The letters of cursing, and the caption, are by the act called the *old law*; and the improvement thereby introduced, is, that, in case the unhappy debtor withdraws his person, his lands are to be subject to execution.

Whatever was produced in an action to found a demand against any party, was with us, as among the Romans, and our neighbours the English, entered upon the record, there to remain *in futuram rei memoriam*. The sentence signed by the judge remained, and a copy or extract was attested by the clerk, and delivered to the party in whose favour the judgment happened to be given. Upon this head Balfour has preserved a very special authority: 'All sentences and rollments of court, given by only sheriff, steward, baillie, provost, or any other judge within this realm, aucht and sould be insert in the court buik, extracted furth thereof, and subscribed be the clerk of court; utherways, albeit the same be subscribed be the judge, it is of nane avail, and makes na faith in judgment, or outwith the same. Aprile 1535, Thomas Spottiswood against David Spottiswood.'

When

When parties, in their contracts, consented to execution against themselves, by letters of cursing, the sentence of the bishop or his official contained a preamble reciting the procedure and production; then followed an exact copy of the deed; and, last of all, the sentence of cursing, and warrant for the letters. The Pope's bulls of excommunication did the same. The notaries in the civil inferior courts, and the judges in our supreme one, were almost all ecclesiastics. They knew no other form, and they constantly adhered to it; of this we shall afterwards meet with many instances.

At this period (I mean during the reign of the five Jameses) our law regarding the effects of decreets, was quite different from what it is now. Debts did not rank upon the property of the debtors, according to priority of diligence, as came afterwards to be the case; the antient maxim, which, as you have heard, continued to be the law of England at this moment, then remained. The estate of the debtor stood bound by the judgment of court, and not by the execution following upon it. Here is direct evidence upon a point, one of the most material in the progress of our jurisprudence, which now seems to be totally forgotten: 'Divers and sundrie decreets  
' (says Balfour) beand obtenit by divers and sundry persounes a-  
' gainst ony man, gif the obtainaris thairof cause arrest his maillis,  
' fermis, and duties in his tenants hands, for payment to be made  
' to them thairof, the tenants aucht and sould pay first to him quha  
' obtenit the first decret, and he beand fully and completely payit,  
' they sould make payment to him quha obtenit the secund decreete;  
' and he beand completely payit, they sould consequentlie pay the  
' rest of the creditors quha obtained decreets, and caused arrest-  
' mentis to be maid, after the ordour and priority of time in ob-  
' taining of their decreets. 5th Junii 1538, Earl of Crawford's  
' tenants *contra* James Rolloch \*.'

The

\* Balfour, p. 391.



The form of the mandate, which in England produced the warrant to confess, and, in Scotland, the clause of registration, *i. e.* the procuratory to consent that a decree may immediately be given against the party, is evidently borrowed from the practice in the Apostolic Chamber. Our clergy were perpetually soliciting benefices, and transacting business at the Court of Rome. When any change, resignation, or other act was to be done by one man in favour of another, the former granted a procuration to resign to an agent at Rome. This agent appeared in the chancery, and performed the business for which he was appointed; as it was generally to consent to something in name of his constituent, the principal procuratory, and the act remained in the chancery, and the consent was noted on the back of the new letters, or other grant, in these terms: ‘ *Dictus A. per illustrem virum D. procuratorem suum literarum expeditioni consensit.*’ This is not only the exact form, but the language of our registrations,—*consenting to the expediting of the letters*; and it is certain, that, during the period when this form was common at Rome, the mandate or procuratory of consent, was equally common in all the courts of Scotland, both ecclesiastical and secular.

The scandalous abuse of the process of excommunication, and the trifling purposes to which it had been applied, contributed not a little to throw an odium upon the old religion, at the dawn of the Reformation. In place of curing the radical evil, and giving dignity to the censures of the church, by reserving them for the proper objects, the prelates thought only of increasing the severity of the process of excommunication, and giving it a double effect upon the civil business of the nation, with which it had not the least natural connection. This mistaken policy produced the act of Parliament 6th James V. c. 9. the violence of which was totally unsuited to the times, and hastened the downfall of the system it was intended to support.

This

This monster of a statute holds out to creditors all the terrors, divine and human, against their miserable debtors, upon condition that they will apply to the church, in preference to the secular judge. They are to have the old caption against the person; they are to have letters for poinding their moveables, and apprising their heritage; and, lastly, they are to have letters of four forms, to make the debtor a rebel to the King, as well as to God, in case the obligation was to perform any thing; for, at that period, letters of horning could not be issued for liquid debts. Another act in the same spirit passed in the 4th Parliament of Queen Mary, c. 7. which forfeited the moveables of the party, who presumed to remain under the sentence of cursing, for the space of a year.

The Reformers did not fail to make a proper use of this folly of their adversaries. John Knox, in his account of the Reformation, paints in lively colours the ridicule which the people began to throw upon this once awful process, which had for ages been the terror of their ancestors.

The Lords of the Congregation were no sooner in power, than they issued a proclamation, for suppressing the church judicatories, and, in particular, the practice of excommunication for civil debts. However plausible and beneficial this might at first appear, great complaints arrived from all quarters, of the inconvenience which the people suffered from the want of the church courts, and the violent stop in the business of the kingdom, which their suppression had created. Notwithstanding the Reformation taking place, and the complete revolution of the antient religion and government of the church, yet did the Reformers find themselves under the necessity of reviving the consistorial jurisdiction, which had appeared the most exceptionable of any part of the old fabric. About four years after the date of the last proclamation, an act of council was passed for erecting commissariat jurisdictions in the kingdom, and empowering

empowering a number of noblemen to draw up articles and instructions, for the direction and government of the new courts. These instructions are to be found annexed to Balfour's Practices. The thirteenth and fourteenth articles afford a full, distinct, and satisfactory proof, of the account given of the proceedings of the church courts in Scotland, of the methods they took to engross the civil business of the nation, and particularly the decreets of registration.

It is here proper to stop, in order to consider for a little the nature of the act. The English, in their warrant to confess judgment, have preserved the essential characters of the business, which is a regular judicial decreet; and the only difference between that, and an ordinary one, is, that the procurator for the debtor, in place of defending the action, confesses that the demand is just, and consents that the judge may award the sum against his party. For this reason, an action must still be brought, the pursuer, or an attorney for him, must appear, and produce the bond or other deed; a separate procurator for the defendant must also appear, with the warrant to confess, which is the reason that these warrants are at this moment granted on a separate paper from the bonds.

In Scotland, the difference originally was not great; when a deed contained a submission to a particular jurisdiction, the first step of the procedure was the production of the deed in presence of the judge to whom the submission was made. If the deed went no further than a submission, it only founded the jurisdiction of that judge, whose business it was to issue a summons against the party; but, if the writing contained a procuratory, consenting to a decreet, and to its execution, then another procurator, of whom the pursuer had the nomination, appeared and consented in terms of the mandate. It behoved the decree then to be regulated by the terms of the deed; and as the deed was the only warrant of the decree, there being no debate about the matter, it was of consequence copied into the roll of court, kept by the clerk as the warrant, and an ex-

tract of the whole procedure given out under the hands of the clerk, for the purpose of execution.

The form of this business was settled at a very early period. In Balfour's Practices, we have the general revocation executed by Queen Mary, according to the custom of the Scottish Princes, at their accession to the throne. It is dated 20th June 1555, and bears a consent: 'That this our declaration be intimated, insinuated, and declared, in the next Parliament to be had in our burgh of Edinburgh.' It bears no mandate to a procurator, because the King's Advocate is the established procurator for the Crown. The registration which follows, is the precise form still retained in all our decrees of registration. It consists of three parts, first the presentment of the deed, and the request of the Advocate; secondly, the consent of the Queen Dowager and Parliament, the judges in this affair; and, thirdly, the execution of the request, *i. e.* the interposition of their authority in terms thereof.

In this place, I beg leave to repeat the proposition, with which I prefaced this discourse, that properly speaking there is no such thing as a register established for personal deeds. They were originally, and still continue to be recorded, merely as the warrants of the decreets following upon them. All our other registers, for the purposes of preservation or publication, were established by particular acts of Parliament; whereas the registration of personal deeds arose from the natural forms of ordinary judicial procedure in our courts; and are of much higher antiquity than any statutory registrations known either in England or Scotland. It is true, that the evident advantages arising from this mode of procedure, led people to adopt the very same method in the registration of deeds, for the purposes of simple preservation, a purpose for which they saw, at an early period, a particular register erected. I mean the register of reversions established by James III.

It

It is necessary to take this distinct branch of the business of registration along with us, because the posterior laws and regulations, which I am soon to notice in their order, relate indiscriminately both to the registration for execution, and for preservation, two things evidently different in their purposes. This last it was, which gave to our decreets of consent, upon clauses of registration, the title of *registers*, and has occasioned the confounding of these decrees with our registers, properly so called, established by act of Parliament.

As far back as can be traced, it was the practice on the continent to execute deeds, contracts, and transactions of every kind, in presence of notaries. The parties themselves could not write; and, therefore, they appeared before a notary and witnesses, and verbally made their agreements. The notary took notes or minutes of what had been agreed upon in his Protocol, and then delivered an extract signed by himself, extended in due form, with all the clauses of common style. This extract answered the purposes of a principal deed. When the parties at any time found it necessary to have authentic copies of the whole, or any part of these deeds, in order to be delivered to persons concerned, or transmitted to distant places, they appeared with a notary and witnesses in presence of the judge, in the jurisdiction where they resided, but in general before the official or church court, produced the principal writing, and requested that it might be examined; and, if found to be valid and sufficient, that the whole or certain parts of it might be copied and extracted from the principal deed, and declared to be equally good and probative as the principal. At that period, there was no such practice known as the depositing these deeds in the courts by way of register. Every thing was done by these kind of copies, attested by a number of notaries, or certified by judges.

All deeds, private and public, were then written in Latin. The most antient name given to a copy of this kind, was that of *exemplum*; but afterwards a number of new epithets were found out for

this, as well as every thing else relating to law or form, viz. *translatum*, *transcriptum*, *transumptum*, *vidimus*, &c. Of these, the word *transumpt* and *vidimus* came afterwards to be particularly distinguished. When princes or great men gave copies from their archives of charters, or other deeds of consequence, they attested them with their own authority, beginning with the word *vidimus*. When the charter, or other grant, was meant to be confirmed or renewed, the writing began with the word *inspeximus*, and took its title from that word. All private deeds, attested, or, as the French say, legalised, by public courts, got the universal name of *transumpt*s. Of all these sorts of copies, nothing now remains but the notorial copy.

These were the only methods of preserving or extracting writings among our ancestors in the thirteenth and fourteenth centuries. About this last period, when decrees of registration upon consent came to be known, and the practice had turned common and familiar of submitting to the jurisdiction of the church-courts by special clauses, the conveniency and advantage of having the principal deed deposited in the record of the public courts came to be perceived; and therefore, at first for the direct purpose, and afterwards, under the pretence of submitting or prorogating the jurisdiction of particular judges, mandates were inserted for the appointment of procurators to consent to the registration of deeds, for the sole purpose of their preservation in *publica custodia*, or, as the clause then bore, in *futuram rei memoriam*. In this manner the several courts of law in Scotland came to hold registers, and were made the custodiaries of personal deeds, without any special establishment, act of parliament, or grant from the crown, as is the case of all the other registers in the kingdom.

In France, they adhered for a long period to the strict ideas of the civil law *insinuations*. The edicts, as in Rome, made them only necessary in the case of donations, and the transmission of ecclesiastical benefices. At last, about the 1553, a register, properly speaking, of personal deeds, was established in that kingdom. Sir George M'Ken-

zie

It is certain, that they borrowed the practice from the Scots, which is not improbable, as their connection with us, at this particular period, was close and constant.

The laws, and the alterations I am now to speak to, will indiscriminately regard the matter of registration both for execution and preservation. When they respect one of these things only, I shall take proper notice of it. We left the history of this business as it stood at the Reformation; and, from the instructions to the new commissariote, at that time erected, it appeared, that, notwithstanding of the clauses of consent or mandates, the act of registration still retained its original and judicial formalities; that it behoved the judge to be present, and to know the parties contractors; and that it also behoved him to interpose his authority, and award the registration in judgment, in the same manner as he pronounced any other decret, excepting in cases of ten pounds Scots, or under. These essential forms continued, to the great benefit of the lieges; of which we have the clearest evidence from the 4th act of the 9th parliament of James VI. All writings were at that time sealed by the parties, in the same manner as they always have been, and still are, in England. The purpose of the seal, as of the subscription, was to prevent forgery; but forgery could not happen in writs that were registered in the presence of a judge, who had knowledge of the parties. The act of parliament therefore declares, 'That the former statute appointing the sealing of writs of importance, is not to be understood of sike writs, contracts, and obligations, as are by the parties agreed upon to be registered in the books of our sovereign Lord's council, or other ordinary judges, seeing the parties consent to register the same, quhilk is *ane greater solemn act* nor the sealing thereof.'

At the date of this statute, then, viz. in the 1554, registration continued to be a solemn act; and this solemnity was universal in all the courts of the kingdom, as well as in that of the commissaries. As the solemnities of registration thus lessened the formalities of subscription,

scription, so, when the solemnities of the former became totally fictitious, additional securities were required to the latter, and were accordingly introduced by the act 1681, as we shall afterwards have occasion more particularly to notice. Even registration, for the sole purpose of preserving deeds, as I formerly observed, could only, even at this late period, be obtained *in forma judicii*. Of this we have the most complete evidence from the act 269. of the 15th parliament of James VI. *anno* 1597. It ordains, 'That all registrations of letters of horning, relaxations, inhibitions, &c. before whatsoever sheriff, steward, or baillies, as well of royalty or regality, be either registered in time coming, judicially, or before ane notary, and four famous witnesses, by and attour the ordinar clerk.' This act is complete evidence of the doctrine, that all sorts of registrations were for ages considered in another light than that of formal decrees of court. Even though the registration of the diligences here mentioned were ordained by act of parliament, yet it behoved this to be done judicially, or at least before a notary, and four famous witnesses, besides the ordinary clerk. If the party appeared when the judge was sitting, and produced his letters in judgment for registration, he was entitled to an act of court upon the fact, and to an extract of that act for the probation of it. But letters of inhibition having formerly been ordained by parliament to be recorded within forty days from the date of the publication, it sometimes happened that the inferior courts did not sit within that period; and therefore a notary public is raised to be a judge *pro hac vice*, under the check of four witnesses, in order that the statute respecting inhibitions might be literally obeyed, and the judicial solemnities of registration preserved. Without attending to the original principles of registration, and to the history I have given, this act of parliament would be utterly unintelligible; and accordingly, Sir George M'Kenzie, and our other systematic writers, have been obliged to pass it over in silence.

In



In the days of Sir Thomas Craig, the solemnities of registration began to fall off, and the act itself to vanish into a mere fiction. 'Registraciones,' says he, 'quae tantum in judicio fieri debebant, ubicunque vel ipse registrarius, vel ejus deputatus adest, licite fiunt\*.'

As judgment in England could not be confessed without the appearance of a procurator to authorise him, so in Scotland, even at this period, it behoved the blank in the mandate of registration to be filled up before a decret of registration could be granted. The creditor in the obligation was possessed of this mandate in the same manner as the English creditor was in possession of the mandate to confess. He therefore filled up the name of an advocate in the blank, and got him *de facto* to sign a consent at the foot of the deed to the pronouncing of a decret in the terms thereof. This formality was found to be troublesome and inconvenient when registration came to be looked upon as a matter of course. It was therefore dispensed with by an act of sederunt of date the 9th of December 1670.

The presence of the judge had been, it seems, practically dispensed with for a considerable time before. The register, or his depute, were sufficient; consequently decreets of registration came to be given at all hours of the day, upon the request of the creditor, or obligee in deeds. A defender, however, was still requisite. The act of sederunt dispensed with the very shadow of him. The whole, then, was thus made to consist in handing the writing to the keeper of the record, just as at present; and the keeper, by the act, had authority to fill up the blank in the mandate with the name of any advocate he pleases. From this time forward, it was no wonder that the business got the name of registering, and the place in which the deed was deposited, the title of register.

Before taking leave of this period, it is proper to remark, that, when the solemnity of registration existed, in place of the short clause,

clause, which took place after the date of this act of federunt, deeds of importance contained a complete procuratory with all the clauses of style, equal in length to the English warrant, and containing all the phrases commonly used in our solemn procuratories in heritable deeds\*.

We are arrived at the period of St Martin's own clause of registration, with a commentary upon which I propose to close this subject.

' And for the more security, we are content, and consent thir presents be insert and registrate in the books of council and session, or others competent, to have the strength of a decreet of the Lords, or judges thereof, interponed thereto, that letters of horning on six days, and others necessar, in form as effeirs, may be direct hereupon ; and to that effect constitute

our procurators,' &c.

*And for the more security.*—These words are as old as the practice of registration itself. They allude to that period of the antient law, when decreets or judgments took place, not according to the diligence or execution of them, as they do now, but to the date of the decreet, as is the case in England at this moment ; and therefore the English, when they want further security for their bonds or obligations, insist upon having a warrant to confess judgment, in the same manner as we would do an assignation to a debt, or an heritable bond upon land.

*In the books of council and session.*—I formerly observed, that of old the churchmen made use of the clause of registration to draw civil business to their courts. When parties consented to the registration in the books of a particular court, it imported a voluntary prorogation of the jurisdiction of the judge to be chosen. Thence it is, that, in the instructions to the commissaries, they are discharged from judging upon contracts, or other deeds, registrated in the books of any other judges. As the churchmen had introduced the practice  
of

\* Vide Carruther's Styles, p. 6.

of condescending upon particular judges, it appears, that it continued to be done for a considerable time. Inconveniencies, however, occurred. The granters of the deeds sometimes retired out of the jurisdiction, and consequently gave defiance to the judges warrant. To remedy this, two or three different courts in the neighbourhood were mentioned, and often all the different courts in the kingdom. This was evidently troublesome and prolix. At last about the 1670, it settled in the style of our text: 'In the books of Council and Session, or any other judges books competent.'

The word *books* relates to the circumstance of copying the writs given in to be registered in books kept for the purpose, separated from the ordinary record of court, which gives this business still more the appearance and character of a proper register. The clerks of inferior courts, without the least attention to their own jurisdictions, endeavoured to increase their business of registration, by taking in writs granted by any persons whatsoever, in consequence of the general terms of the clauses of registration above-mentioned. The Lord Clerk Register, however, obtained an act of Parliament c. 38. of James VII. 1st Parliament 1685, for regulating the public offices, in which he took care to have a check given to this practice of the inferior courts. This statute is now little attended to by the clerks of the inferior courts, who take in every deed offered them, providing the clause of registration admits of it; but, in cases where parties are designed in the deed, as locally residing without the jurisdiction, I should think a good objection would lie upon the statute, because the execution should proceed in virtue of letters of horning obtained in the usual manner upon a bill, or petition, to the Lords; yet the decret of registration of the inferior court is the true warrant of these letters; and the bill to the Lords supposes that warrant to be regular and valid.

'To have the strength of a decret of the Lords interponed thereto.'—These words are among the oldest used in this mandate. They relate to the period I have already mentioned, when decreets took effect

effect from their own dates, as the judgments do in England; and, therefore, the English writers always term the effect of their warrant to confess judgment, by saying that it strengthens other securities. Thus Judge Blackstone: 'And, therefore, it is very usual; in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to any one, empowering him to confess a judgment\*.' These remaining words of our clause of registration clearly prove, that, as Lord Kames has averred, the English bond in judgment, and the Scottish registrable bond, have been originally the same. Our decret of registration, properly speaking, adds neither additional security nor strength to our bond, it only gives expediency and dispatch; but, though decret be obtained, the creditor is neither secured nor strengthened, unless he proceeds to execution by diligence, whereas the strength and security in England lie, and formerly did lie with us, in the decret itself.

'*That letters of horning upon six days and others necessary may be direct.*'—After the effect of decreets came to depend upon the diligence which followed upon them, the practice of mentioning that circumstance in the clause naturally took place. Of old, as I formerly noticed, there was no diligence against the person of a debtor, but by the strange circuit of excommunication; letters of poiding and arrestment were executed against his moveables, and apprising against his land, unless the demand consisted in *facta praeſtanda*, and then letters of horning issued against him upon four charges, commonly called letters of four forms. The clauses of registration in this state of things did not specify the particular diligence, but left that matter to the direction of the law. But by the antient established law of Scotland, no letters or executorial of any kind in civil matters could be issued, but upon fifteen days from the date of the decret, which were then termed,  
and

\* Vol. iii. p. 397.

law upon liquid debts, than creditors, taking advantage of the clause of registration, forced their debtors to abridge the days of law by consent, from fifteen to six, and hence the necessity of the words: 'That letters of horning on six days may be directed.' Where no days are mentioned, the fifteen days of law are understood under the words *in form as effairs*; and the letters of horning must bear that charge accordingly. Whether these six days could be again shortened by consent, is a question undetermined. In my own opinion, I think they could not; because denunciation cannot in the nature of the thing take place, without a previous charge, which is likewise necessary by particular act of Parliament, before pointing can be executed. Six days has been held to be the *minima* of these purposes, for near 200 years; and I apprehend, that no further alteration would now be tolerated.

'*Letters of horning and others necessary as effairs.*'—By the words *others necessary*, are meant letters of arrestment, pointing, inhibition, and apprising, which were sometimes separately taken out; though, in St Martin's time, horning, pointing, arrestment, and apprising, were given in the same warrant or letters.

Having thus explained or annalised the mandate for registration itself, I proceed to take notice of the changes it has undergone in the eye of law, from the beginning of the sixteenth century, to the present time.

As one of the original purposes of clauses of registration, had been to confer a jurisdiction upon a particular judge the effect of this came to be doubted and tried; but by repeated decisions it was found, that the consent did not prorogate; and that it went no further than to support the diligence following upon the decret of registration, without conferring any judicial power. If parties mean that this should be done in any particular case, they must return to the antient method of inserting a special clause for that purpose. The difficulty, however, would remain in what manner the party was to be cited out of the jurisdiction

jurisdiction of the judge; this could only be done by means of letters of diligence from the Court of Session; and whether they would support such a clause, by granting the letters, is a mute point.

A clause of registration being merely a personal mandate, they fell, like all other mandates, under the rule of the Roman law: 'Morte mandatoris perimitur mandatum.' Hence they became useless after the death of either the debtor or creditor, the granter or receiver. The same consequence attended, and still attends the English warrant to confess judgment. No decret can proceed at the instance of a dead man against a living, or at the instance of a living against a dead person. The heirs of the creditor, therefore, could not have a decret of registration, without making up a title to their predecessors, and exhibiting that title before a judge. In general, it was an established rule during the sixteenth century, that though third parties had a direct interest in any deed or contract, they could not register it after the death of one of the parties contractors against the other. An ordinary action was the only remedy.—Shanks against Eiston, January 15. 1635\*. And in the case Channel against Sir Walter Seton, 16th February 1693†, the Lords found the registration by an assignee after the cedent's death was informal, because registration was a decret of consent, requiring an actor and a *reus*, i. e. a pursuer and defender, and the actor being dead, there could be no registration at his instance.

With regard to the heirs of the debtor, a person at first would imagine, that a common decree to constitute the debt in the ordinary method, would have proved equally expeditious and effectual; but upon inquiry, we shall immediately discover, that considerable advantages attended the action of registration. The principal of these was the preservation of the deed itself; and, accordingly, this was one of the principal conclusions of the  
summons.

\* Durie, p. 742.

† Stair.

summons, viz. that the deed may remain in *publica custodia*, which could not be demanded in any other case.

Another effect was, that execution proceeded in the same manner, and upon the same short charge or *induciae*, as it would have done in virtue of the clause of registration. Thus in a case, the feuers of Chappleton against Ernock, 1st December 1630, the Lords refused to sustain the action of registration, at the singular successor's instance, for summary execution upon six days, but ordained him to pursue by an ordinary action.

By the act of the 4th session of William and Mary's 1st Parliament, c. 15. this inconvenience was remedied, and the mandate for registration was taken out of the rule of the Roman law. The act provides, that the holder of the deed requiring registration, shall produce a right to it in his own person; and, in that case, he became entitled to the extract or decret in his own name. This necessity went soon into disuse. The fees of the registration, and the competition of the clerks offices, inclined them to dispense with every ceremony or obstruction, and now for a long time, any person offering a deed, gets it registered without any questions asked.

This practical alteration, though destructive of every idea of registration as a decret, has added to the convenience of the thing, while at the same time, the consequence intended to be guarded against, by the proviso in the act 1693, is more effectually done by another method also introduced by practice. The extract always bears the deed to be registered at the request of the granter or debtor, whether dead or alive; but, before any step of diligence can be taken upon it by the heir of the creditor, or other person having right, he must produce the title (which by the act ought to have been produced at the register) to a Writer to the signet, who gives in a common bill or petition, narrating the title, and praying for a horning or diligence, in name of the heir or executor, which title is examined by the clerk to the bills, and supposed to be examined by the Lord Ordinary, whose deliverance becomes then the warrant of the

the diligence. The analogy of the act 1693, is the alledged foundation for this practice ; but the statute goes upon the just principles of registration, which the practice has entirely deserted. It was no great stretch to continue a mandate in force, after the death of the granter, where the benefit of such mandate was intended for another party. In many cases, the law does this without the interposition of the Legislature ; but the act never authorised any thing so anomalous, so inconsistent, as an action and decree at the instance of a dead man. It provides that the heir or person having right to procuratory, should produce it before registration, and that the extract should go out in that person's name. And, accordingly, his title was specified in the preamble of the extract ; whereas, in practice, as I have said, decrees of registration are every day taken in the names of persons who are no more.

The act 1693 dispensed with the process of registration only in the case of the death of the creditor ; but, to render the convenience of registration complete, another act passed about three years after the former, which bestowed the same privilege after the death of the granter or debtor.

Both these statutes are in direct opposition to the principle of mandates and decreets, for here a decret was awarded against parties deceased, without any salvo or condition. The salvo, however, arose from the nature of the thing,—the decret of registration can have no effect against the heirs of the granter, until a passive title is proved, and the character of heir established by a second formal decret of constitution founded upon legal evidence. The preservation of the deed is the only advantage attained by it, and it was a very small stretch to preserve the effect of a mandate for such a beneficial purpose, after the death of the mandator. Accordingly, a writ registered after the decease of the granter, was allowed to have the effect of a decret of transumpt.

*This*



This last act naturally occasioned the conditions and principles of the former one to be totally neglected. After the death of the grantor or receiver, the actual appearance of a procurator and the personal appearance of a judge became quite unnecessary, and these last turned so frequent that every distinction was dropped, so that the matter of registration has ever since sunk into an absolute fiction.

A registered writing, however, notwithstanding it was gradually divested of its formalities, continues in effect and execution, the same as a decret in absence, taken upon or in terms of an unregistered deed ; as both passed in absence, objections are receiveable against them, but not by exception. Actions of suspension and reduction are necessary to set them aside, which lays the debtor under the necessity of finding caution, and affords several other advantages to the creditor ; nor is the grand objection of falsehood receiveable in any other shape, than a solemn action of improbation.

The clause of registration now in practice, differs in nothing material from those of St Martin : ‘ And we consent to the registration  
‘ of these presents (or hereof) in the books of council and session, or  
‘ other judges books competent, that letters of horning on six days  
‘ charge, and all other execution requisite, may be directed upon a  
‘ decree to be interponed hereto in form as effairs, and for that  
‘ effect we constitute our procurators.’

This is the form inserted in all cases where the deed contains obligations upon the grantor to do, pay, or perform. Where that is not the case, the words are, ‘ therein to remain for preservation.’ Sometimes, though the purpose of the deed be only for conveying, it contains certain clauses of warrandice, or conditional prestations, in which case the style is : ‘ Therein to remain for preservation ;  
‘ and, if necessary, that all execution requisite may pass upon a decree to be interponed hereto.’

*The*

---

---

### *The Testing Clause.*

**T**HE same formalities are by the law of Scotland requisite to the testing clause, as we term it, of every probative writing, whether the subject of it be heritable or moveable. It is of the utmost importance; for, upon the accuracy of its execution, the strength and effect of the deed totally depend. The origin and progress of the formalities of which it consists, reach the earliest periods of our law, and involve several questions, equally curious and useful. I have, therefore, bestowed a distinct commentary upon this clause of our deeds, similar to that upon the clause of registration.

Forms and ceremonies were at first introduced, not as parts of, or essential to a bargain, but to make certain evidence of its having been concluded. These forms being principally objects of sight, could exist only in the memory of witnesses, and hence every thing depended upon oral evidence. The lubricity of witnesses, and the doubts in which matters were often left, induced a rude and superstitious people to seek truth by different methods, sometimes by an appeal to heaven, viz. by the ordeal or trial by treading over red hot iron, or plunging the arm into boiling water; at other times, by single combat; and often by the person who was accused of a crime or breach of contract, swearing to his innocence, and producing a number of his friends, who joined him in his oath.

To remedy such difficulties in evidence, the practice mentioned on a former occasion was introduced, of parties appearing before a magistrate, and their finishing their agreement in the face of the

court. The particular situation, and the inattention of the parties, occasioned this method to be often neglected ; in all such questions, therefore, witnesses were of necessity admitted. By their evidence, every thing was determined, except in cases of great magnitude and importance, where the extraordinary methods already noticed were resorted to. The art of writing, however, being introduced, experience proved that the evidence thereby afforded was much superior to the partial and uncertain declarations of witnesses. The courts of law, therefore, in all cases, inclined to that evidence, and bent their attention to limit the effect of verbal testimony.

The first instance of this alteration we find in the *Quon. Attach.* chap. 81. ‘ All men may prove their debt to the value of 40 shillings, be two witnesses who heard and saw the same, and swa by diverse witnesses, according to the quantity of the debt.’

Writing is a deliberate ceremony, a lasting sensual object, and a living picture of the mind and intention of parties. It is not, however, properly speaking, the obligation, but only the evidence of the agreement ; we ought, therefore, never to confound in our ideas the material or written paper, with the actual preceeding agreement of the parties, which had existence from their consent alone.

The art of penmanship gradually advanced, but was altogether confined to the clergy. A military people would not submit to the acquisition of such an inactive employment ; and, therefore, though agreements might then be formed into writing, that writing could not be connected with the parties, so as to authenticate its being their proper act and deed. The antients, I mean the Greeks, and Romans, and the nations connected with them, authenticated their deeds by subscriptions, by superscriptions, and sometimes by particular sentences constantly used. The greater part of our ancestors could make no such subscriptions ; but they supplied it by making the writer annex the names of the witnesses who were present at the business, and prefixing a particular mark, generally the sign of the cross. The subscription by the cross was an act of religion.

gion as well as necessity. Sir Henry Spelman, the English antiquary, speaking of the Saxons, tells us, that ‘ seals they used none at all, other than (the common seal of Christianity) the sign of the cross, which they, and all nations, accounted the most solemn inviolable manner of confirming. So superstitiously did these times think of the cross, that they held all things sanctified that bore the sign of it; and, therefore, used it religiously in their charters, as an amulet or preservative against injuries \*.’ To these barbarous marks succeeded the use of seals, which, in the form of rings, were from the earliest times used in the east. Princes used them as badges of authority, and power was delegated by delivery of the royal signet or seal ring. From the east it is supposed the custom was introduced among the Greeks and Romans. The former (as they did every other art) carried the engraving of seals to the greatest perfection; and next to the statues, the most beautiful and precious remains of antiquity now in the world, are the engraved gems used by them for private seals. By seals, both public and private, writs in Rome were in use to be authenticated; and, in the case of testaments, the witnesses were expressly required to affix them. ‘ Si testes suo vel alieno annulo non signaverint, juri deficit testamentum†.’ By antiquaries, it is with great probability conjectured, that the use of seals descended from the Romans to the kings of the Franks, and from the kings to the nobility. The Normans borrowed this custom from the other nations on the continent, and brought it into England at the conquest. After that period, the evidence of a deed depended upon the seal alone, without any subscription; but this practice was liable to many inconveniences; the seal, and consequently the writ, might be denied. That the validity of deeds in England should have depended only upon the authenticity

Q 2

\* Per crucis hoc signum, fugit hinc procul omne malignum.

*Spelman's Remains.*

† L. 12. C. de Test.

ticity of the seal is not to be wondered at, while the nation continued in dark ignorance, and while none but clergymen could read or write ; but that the law should have so remained, when no such necessity existed, and when writing had become common, is certainly surprising. The tenacity of their customs has been supported by an equal integrity of manners, or there must have existed some separate and more effectual cheque, against a fraud in appearance so easily perpetrated.

Our countryman Mr Thomas Ruddiman, is clearly of opinion, that the Scots followed the practice of their neighbours the Anglo-Saxons in the method of authenticating their deeds. Of this (says he) the charter of King Duncan I. in Mr Anderson's collection, affords reasonable evidence. This antient deed is tested by the cross of the king, and crosses made by his brother, who consented to the deed, and the witnesses present.

The sealing by Duncan (continues Mr Ruddiman) was done in imitation of William the Norman, who first introduced the use of seals among the English, and often for the more perfect authenticity, joined both customs together, of writing the names of witnesses below, and likewise of appending the seal. In affairs of great moment, witnesses were inserted at the end of the instrument. This practice we borrowed also from the English, and all our kings, from Duncan, have observed it.

The principal method then of discovering the truth, was by a comparison of seals, as we since compare hand writing. Thus matters continued, so far as can be learned, till the 1429, when an excellent precaution was introduced by the 130th act of James I. 9th Parliament, ordaining all freeholders to compare at the sheriff's head court with their seals, and, if they could not attend, to send their attornies with the seals of their arms, under a fine. Sir George M'Kenzie says, that this act was complied with, and every

every gentleman sent his seal to the clerks, many of which remained in their hands in his time.

When the antient manner of executing deeds by the crosses and seals of the granters and the witnesses, went out of practice after the conquest, then every thing was made to depend upon the seal of the granter alone. Deeds were considered to be nothing more, than memorandums to keep the circumstances of the agreement or grant in remembrance; and, therefore, after being read over in presence of the witnesses, their names were simply added by the scribe, with no other preface than *hiis testibus*. Thus *magna charta* is witnessed, and all the deeds and charters of the Anglo-Norman Princes, down to Richard I. who altered the style to *teste meipso*, witness ourself, which is the present form. In private deeds, the attest in general of *hiis testibus*, continued down to the reign of Henry VIII. when writing having become common, the witnesses signed the deeds, either at the foot or on the back, in order to testify their having been present. In Scotland, the witnesses accidentally present, or standing by, as Spelman says, continued to be inserted, whether men or women. Thus, a charter by David Earl of Huntingdon, afterwards David I., is tested in this manner, 'Testimonio Mathildis Reginae et Willielmi filii sui.' This method was continued to the reign of Malcolm IV., where a charter to Walter, Steward of Scotland, bears *hiis testibus*, and another of the same Prince has about fifty witnesses, men and women of the first note\*. This style came soon afterwards to be altered to, 'In cuius rei testimonium sigillum nostrum apponi precipimus, testibus,' &c. Deeds by subjects bore, that the granter had set his seal to them, or caused the same to be appended; but it appears, that witnesses were of no consequence; only Craig informs us, that, where a party used the seal of another, mention was made of it, and the person to whom it belonged, and this, he says, in antient deeds frequently occurred†. Forgeries of  
seals;

\* Anderson's Col. No. 25.

† P. 259. § 15.

seals, however, became common ; and Heineccius, who has treated the subject with learning and industry, specifies no less than six different methods of falsifying them. About eighty years ago, says Sir Thomas Craig, full faith was given to charters, although supported by the seal of the granter alone ; but, in regard many inconveniences happened, after the death of proprietors, either by the fraud of their widows, or of those into whose custody the seals happened to come, and that deeds made after the death of the granter, were often found to be sealed with his proper seal ; therefore, an act of Parliament was made, in the 1540, to remedy evils of such magnitude.

By this act, then, subscriptions were first required ; but writing had become a branch of education, and subscriptions commonly used, long before the act. People had become proud of being able to sign their names, and, unless this had been the case, the act would have required impossibilities. Subscription, however, did not get into fashion all at once.

Every thing at these early periods was preferred, which carried an air of mystery and concealment ; so in place of the full subscription, people of consequence signed deeds, by the letters of their own name, and of Christ or some tutelar Saint, fancifully and barbarously combined. These subscriptions, termed *monograms*, were originally used in seal rings, and were continued in authenticating writings, for ages after the days of Charlemagne, who is said to have been the first Prince who subscribed by them.

Malcolm Canmore is said to have given surnames to his nobility ; and others, not named by the King, took their surnames from their lands, and fitted their armorial bearings to these names. Buchanan thinks that surnames were introduced at a later period, first among the French, and then with us ; he observes, that the second or distinguishing names of the antient Scots, were all taken from some particular mark or quality of the person ; or patronimicks from his  
father

father or other predecessor ; and the same may be said of the French and other nations. Accordingly, Father Mabillon remarks, that surnames began about the commencement of the eleventh century, being only *nicknames* before that period. Thus, Malcolm had *Cannmore*, from a large head,—Charles the *Groß*,—William the *Conqueror*,—Richard *Cœur de Lion*, &c.

As no law prevented people from assuming such names as they pleased, so a latitude in the matter of subscription was also assumed. The natural vanity of our ancestors was nourished by intercourse with the French ; from them some signed by their surname without the Christian name, and many by the name of their lands, altering the title with their property. This bad practice was not corrected till the 1669, by the 21st act of the 3d session of the 2d Parliament of Charles II., which declares, ‘ That it is only allowable for noble-  
‘ men and bishops to subscribe by their titles ; and that all others  
‘ shall subscribe their christened names, or the initial letter thereof,  
‘ with their surnames ; and may, if they please, adject the designa-  
‘ tion of their lands, prefixing the word *of* to these designations,  
‘ under the pain of being amerced by the Privy Council \*.’ I now return to the other requisite of the act 1540, which regards the witnesses to subscription of parties.

Lord Kames notices a great impropriety in our old statutes, which require the presence of witnesses, without enjoining them to subscribe, in token that they did witness the obligor’s subscription. The observation is just, but it does not apply to the act 1540, though the oldest on this subject. That act expressly requires the subscription, both of the party and of the witnesses. In his Lordship’s statute law, it is, indeed, thus abridged : ‘ That no  
‘ faith be given to writs, unless the party subscribe *before* wit-  
‘ nesses ;’ but, in the act, the word *before* is not to be found ; it requires the ‘ subscription of him that awe the same (*i. e.* the oblige-  
‘ ment),

\* Vol. ii. p. 506. Act concerning the privilege of the Lyon..



'ment) and witness.' The words are doubtless, too loose and general, so was the practice following it, which I shall give in the words of Mr Erskine: 'As this statute prescribed no plain rule, about inserting the names and designations of the witnesses in the deed, or about their subscribing as witnesses, the subsequent practice was far from uniform. In a few instances, the witnesses subjoined their subscriptions to the deed, without having their names inserted in the body of it; and more frequently, their names were inserted without their subscribing. But this last practice affording no degree of evidence, that the witnesses inserted were duly present at the granter's subscription, since it was in the power of the writer, even where the deed was truly signed, *remotis testibus*, to name any persons whom he pleased as witnesses\*.' A remedy was intended by the 80th act of the 6th Parliament of James VI. 1579, which statutes, 'That all writs of great importance should be subscribed and sealed by the principal parties, otherways by two famous notars, before four famous witnesses, denominated by their special dwelling-places, or some other evident tokens, that the witnesses may be known, being present at the time, other ways to mak na faith.' Sir George M'Kenzie says, that such writs by this act are to be subscribed and sealed before two famous witnesses. There is not in the act one word of witnesses required to a party's subscription who can write; but four witnesses are appointed to be present, and to be designed in the writ, in case the party cannot write, and when the deed is executed by notaries. The blunder then noticed by Lord Kames, is not to be found in this last act; for, though intended to supply the defects of the preceding statutes, it requires neither witnesses nor their subscriptions; the subscription and seal of the party who can write are held to be sufficient as to his deeds. The error then lay not in our statutes, but in the practice which deviated from the express appointment of the

\* Large Inst. p. 428.

the act 1540, and supplied what was not required in the 1579, by adhibiting two witnesses to the signing and sealing of parties, and by inserting the names and dwelling-places of these witnesses, in deeds, and thus introduced the imperfect cause mentioned by Lord Kames; for, as he well observes, the testing clause being necessarily inserted before the subscription of the party, cannot otherwise than prophetically be evidence, that the witnesses saw the obligor subscribe.

A mistake so egregious proved in fact almost fatal to the evidence of writings. To require witnesses to the subscription and seal, without any certain evidence of their having been present at the execution of the deed itself, was an evident returning to parole testimony by reducing deeds to dependence upon witnesses; and, consequently, opened a constant source of litigation. The designations of witnesses were allowed to be supplied, or more particularly condescended on; in short, every thing turned upon verbal evidence, and threw part of the property of the subject upon the disposal of the judges, who followed no fixed rule, and determined every case by its own circumstances.

No law or remedy appears till 1593\*; but this act in place of supplying the imperfections regarding the evidence of witnesses, introduced an additional requisite in the tests of writs, by ordering the writers names and designations to be inserted at the end of all deeds. Though the act was special, pointed, and express, the Court of Session used the greatest freedom with it; upon presumption that the Legislature only meant to make certain of the writer, they allowed him to be condescended on. Though the act appointed the writer to be inserted before the witnesses, they admitted the insertion any where; and, what weakened it still more, they admitted general and uncertain designations, by which means this law was

VOL. I.

R

attended

\* 13th Parliament James VI. c. 179.

attended with very little effect. Another act, which was made some years prior to this statute, helped greatly to weaken the attestation of writs, viz. c. 4 of the 9th Parliament of James VI. whereby the sealing of all writs agreed to be registered was dispensed with. By this act, it is clear, that sealing remained necessary in all writs not agreed to be registered, or not containing clauses of registration; but the omission in the one case induced the omission in the other, and sealing soon thereafter went entirely into disuse, except in public and private charters.

Matters were allowed to remain on this doubtful footing for upwards of eighty years. Rectification became indispensibly necessary, which was at last effected by the important act of Charles II. 1681\*. This statute enacts, That only subscribing witnesses, in writs to be subscribed by any party hereafter, shall be probative, and not the witnesses inserted not subscribing: And that all such writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses: And further, that no person shall subscribe as witness, unless he then know that party, and saw him subscribe. Sir George M'Kenzie tells us, that this last part of the act was occasioned by the following remarkable case. A gentlewoman pretended that she could not write before company, and desired to sign the paper in her own chamber, and at her return brought it back subscribed, after which she raised a reduction of the paper as not truly signed by her. The act, lastly, provides: 'That the witnesses be designed in the body of the writ otherways to be void and null.' This is the last statute in behalf of the matter of attestation.

Hitherto, during the long period from the Norman conquest, to the reign of Charles II. deeds in England had depended upon the seal alone; and the attest was, 'sealed and delivered.' By an act  
of

\* c. 5. 3d Parl. Char. II.

rights of lands, infomuch that conveyance by delivery, without any writing, remained in England till the reign of Charles II. and Craig assures us, that, in the highlands of Scotland, lands were transmitted, in his time, by seizin *propriis manibus* of the superior. With regard to moveables, the old Saxon custom was continued by the Normans, of transacting business in presence of their courts; and, afterwards, by the various recognizances introduced by statute formerly explained, which rendered transactions of importance almost independent of private formalities.

From causes of the same kind, the inconveniencies arising from the imperfections of the acts 1540, and 1579, were avoided in Scotland, which, at first sight, would seem to have been intolerable. Our forms in real rights were much better calculated than those in England, to exclude imposition and forgery, not only in their own nature, but from the system of registers, the greatest part of which were introduced in that period; and in moveables, the safe-guard lay in the act of registration, which was not a fiction, but a judicial process, that put the attests of the deeds of these times out of the power of the granter to quarrel.

The insertion of a date in deeds, is not required by any express law; Lord Stair, however, holds it to be *de substantialibus*, when the question regards the truth or authenticity of the writing. Mr Erskine differs from his Lordship's opinion; 'as solemnities (says he) are not to be multiplied without a warrant either from statute or universal custom, deeds have been adjudged valid, without mention either of the place or the time of signing;' and for this he cites two decisions, — February 15. 1706, Duncan; and July 21. 1711, Ogilvie\*.

In very antient deeds no dates are to be found. There is no date in the charter of Duncan, nor in many of the older deeds in Mr Anderson's collection. The clergy first began to insert dates in their writings;

\* Erskine, p. 433. § 18.

writings ; but these being generally taken from their church feasts, were very uncertain, and often created great confusion : ‘ In anti-  
 ‘ quis monumentis (says Craig) data, ut ab hominibus priscae sim-  
 ‘ plicitatis, solebant omitti \*.’

Though writings of great antiquity be often found without dates, it has been the universal usage of writers, for centuries past, carefully to insert both the true date and place in the testing clause of all their deeds. If either of these are omitted, or indistinctly expressed, it is a slovenly omission ; at the same time, if any surmise of suspicion arises, or any reason can be assigned for supposing a designed neglect, every presumption will be admitted against the deed itself ; at least, it will be presumed to be of the date most unfavourable to its own validity.

Writings were antiently executed on the broadside of the sheets, and afterwards rolled up ; hence the word *volume* from the Latin *volumina, quia involvuntur et quasi in se retorquentur*. The record, minutes, or transactions of the whole courts of the nation, were written in rolls, and termed the *rollments of Court*. The keeper of the county records in England is named *Custos Rotulorum*, and our Lord Register, Clerk of his Majesty’s Council and Rolls ; and in all the inferior courts, at this moment, the minutes are called the rolls of court. This form was evidently inconvenient. The practice was to paste one sheet to another ; and, in order to authenticate the whole, the party wrote his name at the joining of each sheet, the Christian name upon one sheet, and the surname upon the other. Practice had introduced this method, to supply the defect of evidence, which a deed behoved otherwise to be liable to ; but no law had enforced it. Neglects and errors in this article were consequently not uncommon, and, where they happened, the import fell to the determination of the Court of Session. In such a case, it was natural to determine every case by its own circumstances ; they considered

\* Craig, p. 211.

considered in what sheet the principal obligations lay; how the holder was affected by the objection; whether any thing suspicious appeared in the business; and sustained the deed or rejected it accordingly.

To introduce a certain rule in this particular, and obviate the other inconveniences of sheet writing, an act of Parliament passed in the 1696\*: ‘ Ordaining that every person should thenceforth be  
 ‘ at liberty to write them upon sheets battered together as formerly,  
 ‘ or by way of book, in leaves of paper, either in folio or quarto,  
 ‘ providing that each page be marked by the number, first, second,  
 ‘ third, &c. and signed as the margins were before; and that the  
 ‘ end of the last page makes mention how many pages are therein  
 ‘ contained, in which page only witnesses are to sign where wit-  
 ‘ nesses are necessary, which writs so executed are declared to be as  
 ‘ valid as if written on several sheets, battered and signed on the  
 ‘ margin, according to the present custom.’

This act is the rule of our practice in these matters; and subscribing has thereby been made a statutory solemnity, which is therefore to be carefully attended to, wherever the old form of writing on sheets may happen to be preferred. The last requisite to our deeds is, that they should be written upon stamped paper, a requisite happily unknown to Mr Dallas, and our other predecessors of the seventeenth century; none of our writers on the law have ever looked farther for the origin of this business, than to the acts of Parliament of William and Anne; but, in fact, the marking or stamping of the paper for writing deeds is as old as the reign of Justinian. All notaries were discharged to write their deeds upon any other paper, but what should be furnished them by the public, marked with the name of the comptroller of the finances for the time. The papers so marked they distinguished by the title protocol.

From

\* c. 15. 3d sess. 1st Parl. Will. III.

From the stamp paper discovered in the study of the Roman law, several of the states of Europe, and particularly the French, taxed the business of writing deeds, by obliging the notaries to write upon protocols stamped and marked on the top by an officer of the crown. At last, in April 1674, the tax was extended to all deeds, and the paper upon which they were written was called *papier timbré*. Though our King William mortally hated Lewis XIV. he was glad to follow his example in this business; no sooner was the French revenue of the stamps known in the Court of England, than a similar tax was determined on. Accordingly, paper and parchments were first taxed and stamped by Parl. in the 5th of William and Mary 1693, and by various acts since that time have been extended and increased, according to the demands of government, and the necessity of the times.

These acts declare, that no deeds written on any paper not stamped, shall be available in law or equity, until payment of a penalty over and above the duties. In England, payment of the duties and penalty is always received in the courts, because the law only meant to secure the revenue, not to destroy the evidence of parties. With us, the action stops till the duties are paid at the office, and the deed stamped; because there is no person in the court entitled to receive it.

Since the introduction of stamps, we, in imitation of the English, never fail to mention in the testing clause of our deeds, that they are written on stamped paper, or paper duly stamped. This is not necessary, the stamp speaks for itself better than the writer; but, as our principal deeds are, for the most part, lodged in the record, this circumstance could not otherwise appear upon the extract.

We have now gone through the whole of our laws, regulating the solemnities in executing of deeds deduced in the order of time; the application of these laws must be followed, as it occurs in the decisions of our courts; and thence we arrive, by the surest road, to a perfect knowledge, not only of the general import of the testing clause,

clause, as now understood, but of all the exceptions and variations which have hitherto occurred in practice.

The attest of a deed is its principal defence ; if this fort is not strong, all is in danger ; upon that side it is sure to be attacked. No reduction is brought without alledging roundly, by way of random shot, that the writings called for want the solemnities essential in law. That we may defend ourselves then, and attack others with success, let us examine how this business has hitherto been carried on, observing the order already laid down.

The first thing then is the subscription of the party, required by the acts 1540, and 1579, regulated in method by the act 1672.

These acts, in the matter of subscription at least, are simple and express ; the name of the parties is required if they can write, and, if they cannot, a method is prescribed of supplying the defect by notaries. A person who, by imitation of a couple of letters learns to make the initials of his name, cannot be said to write, nor can such an awkward, shapeless letter be termed a subscription. It is the habit of writing that gives character to the hand, and affords that variety, and, at the same time, that distinction of writing to each individual, which has by some been considered as Providential. A person who writes no more than two letters, does it seldom ; what he puts upon paper has little or no character ; it is easily forged, and cannot well be detected *comparatione literarum*. The statutory provision of notaries excludes all these evils ; and, therefore, the Court of Session ought to have rejected *in totum* subscription by initials, to deeds of importance. Led, however, by the hardship of particular cases, these salutary statutes have been weakened, nay, contradicted, both in the words, and in the spirit, by the practice of the Court. They admitted subscription by initials, upon a proof brought, that parties were accustomed so to subscribe ; and they held the production of a single separate writing, so executed, as a proof of the fact.

When



Where the custom of the party was proved, and the instrumentary witnesses divided upon the actual subscription, the Lords called *ex officio* for the pursuer's oath, and allowed him to throw the balance in his own favour\*. Afterwards, the objections to this practice being strongly urged, the Court retracted, and found, that a proof of the actual subscription of the deed quarreled is necessary, and that by the instrumentary witnesses, and none others†. The principle of this decision is presumed to be our present rule in this matter. If the initials are denied, and the witnesses alive, a proof of the actual subscription must be brought. The witnesses being dead, the Lords afterwards found a proof of the parties custom so to sign sufficient.

No device to make a party subscribe suddenly, who could not do it before, is admissible,—such as leading the hand,—writing with a pencil, and making the parties trace it. No such subscription can be said to be that of the party; and, therefore, in terms of the statutes, writs with names so adhibited are simply null. Such was the fate of a disposition, which the party had subscribed, by tracing the shapes of letters made with the mark of a pin‡.

Contrary to the act 1672, an assignation was subscribed thus, *Fullarton of that ilk*; the want of the Christian name was objected to it, and repelled, because the act does not annul subscriptions, but subjects the party to punishment by the Privy Council§.

The first words of the testing clause are, ‘*in witness whereof I have subscribed these presents*.’ The want of the words, ‘*I have subscribed these presents*,’ was objected to a bond; but they were not necessary, because the law trusts not to the assertion of the party, or the writer of the deed, but to the subscriptions themselves||.

If

\* November 16. 1667, Laird of Cultraes.

† June 1681, Coutts.

‡ November 18. 1750, Crosby.

§ June 21. 1765, Sir Thomas Gordon.

|| June 21. 1765, Gordon.

If the deed consists of more pages than one, the clause proceeds, '*I have subscribed these presents, consisting of this and the ten preceding pages.*'—The only case (except in seisin) where the objection of not having mentioned the number of the pages, happened to be pled. was against a testament of four pages written on one sheet. The testament upon that account was sustained\* ; so that it seems we are only to understand the act as applying to deeds consisting of more sheets than one ; however, practice makes no such distinction, and the act is in every case literally complied with. The next requisite is, '*written upon stamped paper.*' It has been adjudged, that two deeds cannot be written on the same sheet of stamped paper ; but a discharge of a bond or other obligation on the same sheet is certainly good ; neither is it a nullity, that the paper was not stamped at the date of the deed ; it is sufficient to have it done before production in judgement.

The next thing is the name and designation of the writer, first introduced by the act 1593, and ultimately established by the act 1681. We have heard how the first of these acts, which was also special and express, was deprived of a great part of its authority and effect, by the subsequent practice of Court, which came at last to be corrected by the statute 1681, declaring that the want of the writer's name and designation should thenceforth be a defect, not suppleable by any condescendence.

Printed bonds have been sustained, where the names of the parties, the principal sum, annualrents, terms of payment, and penalty were inserted, and the insertor designed. The testing clause likewise has been disjoined from the deed, and sustained, though written with a different hand, without naming the adjector†. The first of these decisions is a dangerous deviation against the words and principle of the statute ; it is dangerous, because it encourages irregularity.

\* January 7. 1742, Robertson.

† June 9. 1710, White.

irregularity in the engrossing of deeds, and brings all such under the power of the Court. The essential clauses differ in every security, and the judges of consequence can only determine what are essential, and what are not; it is against the words and principle, because the act intended that the writer of every word of the deed should be mentioned; if, therefore, there was any part, the writer of which did not appear, that part ought to have been held *pro non adjecto*.

The writer of a deed is not always at hand, at the time of its being subscribed. It is, therefore, extremely commodious, that the testing clauses of deeds may be inserted by any person employed. Sometimes the deed is first subscribed by the party and witnesses, and the testing clause afterwards filled up. In these cases, a sufficient blank space is always left between the writing and subscription. Errors in this have often occasioned disputes. When the space is insufficient, the superfluous words have sometimes been razed to procure room, and at other times part of the testing clause has reached below the subscription. The Court have no doubt sustained such deeds, where they appeared to be otherwise unsuspicious; but those decisions are no precedents. By a series of decisions, the Court found that the act 1681 extended only to the writer of the body of the deed; so that the omission of the name and designation of the writer of the testing clause is not fatal. The letter of the act 1681 will no doubt bear this construction; but it could not be the meaning of the Legislature, if it was of importance, that the writer of the body of the deed should be known, it was certainly necessary that the writer of the testing clause should also be ascertained. When the name or designation of the writer happened to be totally omitted, the judgements of Court were for a considerable time regulated by the statute; they refused to admit the nullity to be supplied in any case; at last, they began to relax, and an opportunity soon offered, in which the obvious innocence and ridicule of the case carried them against the judgment of law:

A scroll of a discharge was sent by a Writer in Edinburgh, to be executed in the country. The scroll contained his own name as the writer. It was copied by a country procurator verbatim, retaining the name of the writer of the scroll. The objection of this plain nullity was made to the discharge. The Court allowed the writ to be supported by a proof of the verity\*. Ridiculous as this accident was, it occurred again three years afterwards. The Court saw the danger of their last judgment in its proper light, and, in terms of the act 1593, found the writing null, the real writer being neither named nor designed. At a later period, they again relaxed, and, at last, two cases occurred, in which the Court in a manner repealed this part of the act altogether. They sustained the objection to the want of the writer's designation in the docquet of accounts; but they found the omission suppliable by proof, and upon a proof sustained the docquet†.

The necessity of the date, as before observed, not being established by statute or universal practice, bonds without a date were sustained, in regard they contained a specific term of payment‡. Though, in a case reported by Lord Stair, 7th June 1666, the date seems to have been considered to be an essential solemnity; in all cases, where the validity or the preference of a deed depends upon its date, that date, as remarked, is essential by the nature of the thing. Thus a disposition in prejudice of the heir at law, having no date, would be presumed to have been granted within the sixty days of death-bed; and, in a competition with other deeds or diligence, the most unfavourable date would be annexed to the one deficient in that article. An innocent error in date would not infer a nullity; but where a bond was antedated, to preserve it from an inhibition, the Court, in resentment of falsehood, annulled the bond *in totum*. According to the same principles, an assignment with a false

\* 23d December 1707, Irving.

† 23d November 1743, Duke of Douglas.

‡ Durie, 11th December 1621, Hamilton, &c.

false date was totally set aside, and presumed to be done in order to obtain a preference in a competition\*. An objection of a false date, in order to avoid the plea of death-bed, was moved against a disposition. The defender answered, ' That a false date by law is not ' fatal to the deed, unless designedly done to prejudice a party : ' That the present error was imputable altogether to the stupidity of ' the writer, who, in copying from a former disposition, transcribed ' the date of it in the new one.' The Lords allowed a proof of this defence by the instrumentary witnesses.

The omission of the place of subscribing has been uniformly found not to be a nullity†. By custom, however, the place is seldom or never omitted to be inserted, and the omission of it in a doubtful or suspicious case would have considerable weight. As the true place aids the memory of all concerned in the transaction, to a wrong or false place would mislead, and in some cases might prove fatal to the deed.

The Testing Clause concludes with the names and designations of the witnesses. For a considerable time, the Court adhered strictly to the letter of the statutes, and refused action to all deeds in which an omission in these particulars appeared; nay, an error in the Christian name being inserted, different from that of the witness subscribing, annulled a bond‡. At last, as in the former matters, the Judges began to relax; they sustained the very general designation, indweller in Edinburgh, upon the person interested condescending upon circumstances sufficient to distinguish him§. Where the designation of the last witness, might in language be applied to both, they applied it accordingly, thus, ' A. B. writer hereof, and ' C. B. at Leckie;' the last words *at Leckie*, were held to be the designation of both witnesses||. Afterwards they refused to do this, in

\* 29th March 1626, Keith.

† 14th July 1709, Vallay. 21st July 1711, Ogilvy.

‡ Forbes, 15th July 1707, Abercromby.

§ 29th November 1698, Grant.

|| Forbes, 14th December 1708, Sheriffs.

in a similar and more favourable case \*. A bond, in which one of the witnesses wanted a designation, was sustained, because the obligor had paid a part of it. This was to find the nullity, not a total one, but resolvable into an exception which the party might renounce or homologate †. Having thus reduced the act 1681 to an exception, in place of a simple denial of action, which the words clearly import, a distinction was introduced between deeds defective in the matter of witnesses, and those which wanted them altogether. Homologation, or an implied acknowledgement of the verity of the deed, was admitted to exclude the exception, consequently the direct acknowledgment by oath behoved to be also admitted. Thus, a contract having only one witness, and consequently null by the act, was allowed to be supported by a reference of the verity of the subscription to the granter's oath ‡. In the other case, where there were no witnesses, action was totally denied §. Such uncertain anomalous judgments must always follow a deviation from the solid ground of express statute law, and time, in place of rectifying, multiplies the contradiction, and broadens the error. Thus, so late as the 1738, the Court refused to supply a defective obligation, upon offer of the most pregnant proof ¶; and they had, in the 1710, acted upon the same principle, in refusing to admit a reference of the verity of the subscription, or even of the debt itself, to the granter's representative ¶¶. Yet, in the very same year, they allowed the omission of a writer's name and witnesses to be supplied by a condescendence and proof \*\*.

These decisions, however, it is to be hoped, will be no precedent, and that the Court will return to the rules of the statutes. Their decision, 26th December 1752, seems to promise as much. A bond

was

\* 9th November 1714, Halden.

† 26th December 1695, Beattie.

‡ 25th January 1738, Low.

\*\* 2d February 1710, Maxwell.

† 17th February 1715, Sinclair.

§ 22d December 1710, Gordon.

¶ 4th January 1710, Leopi.

was then annulled, because one of the witnesses happened to be designed brother-german, in place of brother-in-law, to a third party\*.

These varying opinions of the Supreme Court have had little or no effect upon the practice of our conveyancers. These gentlemen have strictly and circumstantially adhered to the solemnities required by the legislature, which is the only method to avoid the uncertainty of legal decisions. Experience has taught, that objections upon informality are often sustained or rejected, not according to the merits of the error or omission itself, but according to the favourable or unfavourable circumstances of the case, or the ideas of equity or expedience thereby impressed upon the judges.

There is no express law for regulating the additions on the margins of our writings, except they are considered as distinct deeds, and consequently included in the general rule of the act 1681; but the natural presumption is, that they are added after execution, unless the contrary appears. Being parts of the deed, they require subscribing. The practice therefore is, to comprehend them within the subscription; *i. e.* writing the Christian name upon the left side, and the surname upon the other, which must be done before the subscribing witnesses. These additions are attended with all the requisites in the body of the deed, separately expressed, or rather repeated; and, if they are made at a different time, or before different witnesses, all this, as already mentioned, must be distinctly expressed. The common term, *marginal note*, is an improper one. A *note* is an observation, criticism, or explanation of some part of the text; whereas, the matters we are talking of are additions to, or amendments of the text, and should be so named. The subscription at the bottom of the page does not apply to the interlineations, and therefore they ought to be totally excluded from practice, even where it may be thought.

\* 26th December 1752, Creditors of Graham.

thought to be obviously innocent. An assignment, in the narrative, bore 4000 merks to be due by the cedent, and that the assignee had advanced to him an equivalent sum. In the assigning words, however, the writer mentioned only 3000 merks, and, upon discovering the error, he amended it by an interlineation. The Lords sustained the assignment, but they condemned the interlining as unwarrantable \*. The security of deeds, in the case of amendments, so excellently provided for by practice, has also been weakened by posterior decisions of the Court of Session. An amendment upon a backbond, signed by the granter, was found good against the user of the deed, though no mention was made of it in the testing clause †. The reason, in this case, was the presumed impossibility of adding any thing to a writ in the possession of a creditor. It was objected, in another instance, that marginal notes were thus attested, ‘and witnesses to the marginal notes also.’ Answered, that these words did not bear the marginal notes to be signed before witnesses. The Lords, however, repelled the objection ‡. Where there are many parties to a deed, they subscribe at different places, upon different dates, and before different witnesses. A writer must be particularly attentive to have all these separately and distinctly expressed.

As these long attests can more conveniently be filled up by the writer of the deed, or at least by one writer, the method is, to keep notes of the several dates, places, and designations of the witnesses, until the subscription be complete. A bond by a son as principal, and a father as cautioner, happened to be thus tested, ‘I have written and subscribed these presents.’ It was objected that the cautioner’s subscription was not attested: The bond, however, was sustained, in respect of the cautioner’s being an accessory obligor §. This decision, it is apprehended, would not be a precedent; it is clearly against the statutes, and against the nature of cautionary obligations,

\* Forbes, 21st December 1709, Lyon.

† Kilkerran, June 17. 1741, Spottiswood.

‡ Dec. 7. 1752. Broomfield.

§ Feb. 11. 1748. Taylor.



A disposition quarrelled upon the head of death-bed, appeared to be vitiated in date and place. The pursuer contended, that, in that case, the date and place were *inter substantialia*, the presumption of law being, that the real date had been erased, and another superinduced, more than sixty days prior to the death of the granter, in order to avoid the challenge of death-bed. The Lords allowed the verity of the date and place to be instructed by the instrumentary witnesses. Here the circumstance seemed to exclude the possibility of antedating\*. A disposition under the same objection, appeared to be written with different inks some old and some new. It was signed by a woman, but had been originally intended for a man, the word *his* being altered into *her*. The Lords subjected the holder to prove, that this deed had been read over to the granter, and subscribed of a date seclusive of death-bed†.

Obliterations or illegibility, have often been attended with effects equally fatal; half a line in a material part of a bond being plainly obliterated and unintelligible, the Lords annulled the bond, upon the presumption of a bad design, as the words might have been material‡. The condition of a bond being partly scored, and partly illegible, the bond was found not to be probative§.

In short, every error, even of the slightest kind, in this very material clause, is attended with danger; and these errors are not only taken hold of by the Court, in cases where unfavourable circumstances are presumed, but also in competitions, where the debt happens to bear hard upon other creditors: so that in the writing and execution, we cannot be too careful; for, like an open countenance, or a plain simple speech, integrity is presumed upon the sight of a fair, distinct, clean written deed, regularly attested, as the law directs.

The

\* February 1730, Errot.

† Fountainhall, 19th February 1702, Livingston.

‡ Stair, 22d November 1671, Pattillo.

§ Forbes, 18th July 1712, Earl of Bute.

The omission to sign any of the pages is attended with the worst consequences. Cautioners have insisted to be liberated; and consenters, that their consent should be limited to the part of the deed by them subscribed. To omit the subscription of pages, would be just equal to the omission of subscribing sheets. A deed was found null upon this head\*. A disposition against which the same quarrel lay was sustained, in regard the sheet subscribed contained every thing material in the deed†. In the case 13th February 1728, Earl Dalkeith, it was argued, that the attest of the subscription of consenters was not within the act 1681. The act, however, was found to be general. The subscription of a party as consenter to a contract of marriage, consisting of sixteen pages, happened only to be adhibited on the last. The Lords found that this single subscription did not affect the consenter as to any thing contained in the fifteen pages unsigned.

All the necessary blanks should be carefully filled up, and no void spaces be left in which any fraud may be perpetrated, or super additions made; and it is to be taken for a sacred rule, that, after subscription, no blank is to be filled up, by which the interest of the parties can in any shape be affected. To leave dates, and sometimes designations, blank in the narrative, is common; but this is done, only *narrativé*: the deeds, or other matters alluded to, fully supplying these words. In general, the presumption of law is, that all blanks were filled up at the date of the subscription; but, if any other matter of importance turns upon this circumstance, and any thing appears, to be done, *ex post facto*, it leads to an inquiry by parole evidence, and places the deed in danger.

This is the place to consider the proper persons to be chosen as instrumentary witnesses, at the execution of deeds. The first thing to be attended to, is the age of such witnesses. A minor is habile,

T 2

because

\* Bruce, 18th December 1714, McDonald.

† Forbes, 23d November 1708, Sym.

because his judgment is presumed to be sufficient for the purpose ; but a pupil is not. A contract was set aside upon the objection, that one of the witnesses had been at the time a few days short of fourteen years of age \*. Witnesses to deeds are in law presumed to be chosen or required ; and, therefore, the nearest relations may be chosen. Sir George M'Kenzie doubts if women may be witnesses, although no law expressly excludes them. The exclusion of the female sex arising from antient customs and manners, was kept up by other concomitant circumstances, and by the nature of the thing. Men who could write their names, were long very scarce in both kingdoms, but women much scarcer, writing to them is a very modern piece of education. In general, they are opener to imposition than men in matters of civil business, and as instrumentary witnesses are always presumed to be chosen or required by the parties, the choice of women was avoided as suspicious. In criminal matters they came to be admitted, because accident or necessity made them witnesses without any choice, they were therefore necessary, and often no other are to be had. Inveterate practice has now made it a rule, that women are totally shut out from being instrumentary witnesses. Whether in the want of men, a deed witnessed by women would be sustained or not, has never yet come to trial.

A creditor cannot be witness to an obligation in his own favour ; and it is a general rule, that no person is a proper witness, where he has a direct interest to support the deed ; though the favour of testaments once prevailed with the Court, to allow the subscription of a legatee as a witness †.

Famous witnesses, as the law terms them, or witnesses of the best character, should always be called upon ; but if a person lying under objections in point of character, happen to be made a witness, one of the parties cannot afterwards object to him, the choice being presumed to be made by mutual consent ‡.

The

\* 12th December 1738, Davidsons.

† Marcus, March 1685, Graeme.

‡ Fountainhall, 1st February 1710, Baillic.

uninterested; for instances there have been, where such relations have denied their subscriptions, and set aside deeds to their own prejudice. This objection is at present not much in practice. It remains, however, in full force, and would be fatal to many of our late writings, should the experiment be tried.

It is now proper to observe, that instrumentary witnesses have no concern with the subject matter of the deed, to the attestation of which they are called; and, therefore, though the paper must either be read over to, or read by the party, before his subscription, there is no necessity for this being done in presence of the witnesses, —it is the subscription alone that they are called upon to attest. It is, however, expedient to allow the witnesses to be present at reading of the deed; and it is plain, that if witnesses had not been made more acquainted with the contents of deeds formerly, than they generally are now, it is impossible they could have so often supplied the want of solemnities, as from our decisions it is evident they have done. As a witness is considered to be a simple attester of the subscription, he is consequently bound by nothing to his own prejudice in the deed. To bind him he must be taken as a consenter, but if it could be proved, that the deed was read over, and he notwithstanding remained silent, though he might not be bound, strong presumptions would arise against him in an after dispute; nay, if he was present at the agreement, or concerned in it as a relation, it will go far to exclude any quarrel afterwards made by him, especially in contracts of marriage, where a father or a brother signs witness to his daughter or sister's deeds.

It happened that a person signed a deed as a witness; *i. e.* he added the word witness to his subscription, and it was pled, that he was not bound; luckily the party interested was able to prove, by the real witnesses, that the deed was read over in their presence; the adjunction, therefore, was justly held to be an error of no bad consequence. In one case, it is absolutely necessary, that the witnesses  
be

These passed from hand to hand, and, if filled up by the last holder, were held to be sufficient ; it is impossible to conceive a practice in more direct opposition to the letter, the spirit, and the genius of all our statutes, and even our common law. It arose from the weakness of these statutes, as explained and supported by the decisions of the Court. It being once determined, that the parts of a deed might be filled up by a person different from him who wrote the body of it, then it came to be of little importance how much of it was left blank at subscription. The name and designation of the creditor, or receiver, was, no doubt, one of the most essential parts of the deed. It behoved the name of the writer of the essential part, at least, to be inserted ; but that rule was in this case dispensed with. It was next objected, that these blanks were plainly filled up, after subscription, different from the intention of the granter ; but this was easily obviated by a presumption borrowed from the civil law : ‘ *Omnia presumuntur, solemniter acta ; et interpretatio sumenda est, ut actus valeat.*’ In general, the insertions quarrelled, were presumed to have been made at the time of subscription. Writings without a creditor or receiver, were in reality no deeds at all ; they invited the commission of fraud in all its shapes, and ridiculed all our laws upon these subjects ; yet did our Courts support this bad practice, until it became an unsufferable nuisance, and as such, was rooted out by the act 1696, c. 25. By this act, a writ may still be subscribed blank, but then, if it is afterwards filled up, the same witnesses must be called to see it done, and, if filled up with a different hand from the body, the docquet must bear the *res gesta*.

Having gone through the history of the solemnities necessary to the execution of deeds by parties who *can* write ; it is now requisite to consider the provision made by law for the convenience and security of these people who *cannot* : Formerly this class was much more numerous than it is at present. From the barbarous pride of the feudal superiors, and the depressed state of the common people, writing was for a long time confined to the clergy. However  
unnatural

made to read ; and if the bishop, upon hearing him, said, *legit ut clericus*, he was delivered to the ecclesiastical judge, who, after a mock trial, by brethren clerks, most assuredly acquitted the learned culprit. This was a very great encouragement to the acquisition of these arts. In a statute of Edward III. *anno* 1344, ordaining an investigation into many national abuses, we find the following curious article of inquiry : ‘ Also into the conduct of keepers of prisons, who teach lay persons who are in their custody the use of letters, in order to save their lives, in disturbance of the common law, and the prevention of justice being done against lay persons, in deceit of the King \*.’ Thus the jailors turned schoolmasters to thieves and murderers ; a strange academy sure enough ! It was, after all, the discovery of printing, and the reformation of religion, which accelerated the knowledge of letters, at least amongst the reformed. To read the scriptures, was for a long time the most desirable faculty imaginable, and, next to that, writing came naturally to be established as the common and general education. The Reformation, however, did not in England banish the old benefit of clergy ; it continued above a century, and in full force ; but, in the mean time, reading and writing continued to gain ground, consequently clergymen grew extremely numerous, and, therefore, felonies came to be distinguished into clergyable, and not ; and every statute establishing a crime, to this moment, prescribes the punishment, and excludes the benefit of clergy.

In Scotland, no such absurdity gained ground ; because, having little municipal law, and few established customs, we never were strongly attached to any. Before the reformation, the laity of Scotland were extremely ignorant, and the unsettled state of the country, and the extreme poverty of a great part of our people, prevented their progress in the arts of life, and particularly in reading and writing. In every act of Parliament, therefore, regulating the execution

\* Barroyl. p. 235.

execution of deeds, provision is made for the convenience of those who cannot write. Our first reformers were ignorant, and the people in general more so. In the reign of the Episcopal clergy, common education made some progress among us ; but the Presbyterian revolution threw every thing back again. Their first clergy were not chosen from the knowing class of the nation, they arose from among the people they prepared to teach.

I now proceed to the deduction of our statute law, regulating the mode of executing deeds for those who could not, or who cannot yet write. The 117th act of James V. 7th Parliament, first required both the subscription and seal of the party, ' or else gif the party cannot write, with the subscription of an notar thereto.' Long before this act, subscriptions had been used ; notaries themselves authenticated all their instruments by their sign and subscription ; and, in cases where subscriptions were deemed necessary, they led the hand of the party. One notary was sufficient by this statute, a circumstance which argues the greatest confidence in these officers. It will be remembered that the subscription was only a novel requisite, adhibited in *majorem cautelam*. The law trusted principally to the seal. This method of supplying the want of a subscription, by leading the hand, was certainly an improper device. The subscriptions were not done by the parties, and, in leading the hands of others, the writing behoved to be awkward and devoid of character. The only objection, therefore, for some time, moved against deeds so executed, turned upon the authenticity of the notaries ; for the deeds *ex facie* proved nothing. At last, the solemnity of subscription of parties who could write, acquiring more and more confidence, the seal came proportionably to be less relied on ; and experience taught, that the trust to a single notary, of subscribing for another person, was too great ; and, therefore, by the act of James VI. 1579, c. 80. all deeds of importance were ordained to be subscribed and sealed by the principal parties, if they could sub-

scribe: ' Utherways by two famous nottars, before four famous  
 ' witnesses, denominated be their special dwelling-places, or some  
 ' other evident tokens, that the witnesses be known; otherways to  
 ' mak na faith.' It was by this act plainly left to the Court to de-  
 termine what is, or is not, a deed of importance, so as to fall with-  
 in the meaning of it. Accordingly, the Court reduced an oblige-  
 ment for more than a L. 100 Scots, because it was signed only in  
 presence of three witnesses. At the same time, they declared, that any  
 thing exceeding that sum in value, without regard to the quality of  
 the parties, was to be reputed a matter of great importance\*.  
 These decisions have, accordingly, been observed as a rule ever  
 since; and, consequently, deeds for or within L. 100 Scots, are  
 not held to be within the statutes, and may be supported by wit-  
 nesses, if the evidence they afford be suspicious. And, upon the  
 same principle, defective writs for more than L. 100 Scots, are often  
 restricted to that sum; and, in general, it may be held, that witnesses  
 are competent in every case to that extent.

It is here necessary to remark, that, unless the value is precise in  
 money, we are never to trust to this exception.—We are never to  
 apply it to annual prestations, however small, to tacks, or any part of  
 heritable rights; for, in the case of a disposition of heritage, where  
 the lands were within a L. 100 Scots in value, the deed was re-  
 duced†. The value of lands may alter considerably; and, there-  
 fore, all deeds respecting them are within the statute. It is the value  
 or interest with regard to the debtor, not to the creditor, that is to  
 be considered: Thus, a bond of provision to three daughters, for  
 L. 100 Scots each, was reduced; because, although it formed three  
 separate bonds to the creditor, it made a bond of L. 300 to the  
 debtor‡. So far as regarded the number of the notaries and wit-  
 nesses, the decisions of Court have been strictly regulated by this  
 act.

\* Burne's, *ult.* January 1623, and 13th November 1623, Marshall.

† Elgar, 23th June 1725.

‡ 16th January 1668, Anderson.



act. They uniformly reduced, where any of these were wanting, or restricted the deeds quarrelled, to L. 100 Scots. In some cases, where the deeds were granted in implement, or satisfaction of former ones, they went the length of supporting them. Such as a bond-granted in implement of the sum due by a contract of marriage, and a disposition of moveables in security of bygone tack-duties. The principle was, that such deeds, being strictly in terms of their relatives, were not, *per se*, of importance.

The act requires that both notaries and witnesses should be present, and that the notaries subscribe at the same time, or *unico contextu*; for it is the number, and the joint act and evidence of that number, to which the law trusts. They are termed *co-notaries*, i. e. joint attestors of the same fact; so, in all cases where notaries or witnesses subscribed at different times or places, the Court have uniformly set aside deeds so attested.

At this time, the evidence of writings lay entirely upon the subscription of the notaries, and the memory of the witnesses, if alive; for the last act did not require the subscription of the witnesses, in testimony of their presence. This was supplied by the important statute 1681, which, so far as relates to deeds signed by the granters themselves, has been fully explained. To find four persons who could write, would, in the times alluded to, have been extremely difficult; and, therefore, the solemnities of deeds, it is evident, kept pace with the improvement of the people. In the 1681, writing was observed to have been ordinary; and, therefore, the old defect was supplied, and the subscription of witnesses required. The act likewise gives the reason of this requisite, viz. that the subscription might assist the memories of honest witnesses, and afford a check against the intentional denial of dishonest ones. Six persons, therefore, must now concur, two public officers, and four witnesses, in one act, before a deed can be signed for another person, and the deed fortified with all their subscriptions. By the same act the witnesses must know the party; ' and see or hear him give warrant to a not-

' tar

'tar or nottars to subscribe for him; and, in evidence thereof, touch the nottars pen, otherways the witnesses to be punished as accessory to forgery.' Accordingly, in practice, notaries always sign their attests. Sir George M'Kenzie puts a question, whether a witness subscribing contrary to the direction of this act, would not be liable to an assignee for damages upon reduction? but he does not resolve it. The witnesses must see or hear the command given. M'Kenzie again asks, How a witness can *see* a command given? and whether a nod from the party, upon the notary asking the question, would be sufficient? that being the only way of hearing a command, and *nutus* by the civil law being sufficient to constitute a mandate. I apprehend the word *see*, in this place, to be an inaccuracy of expression; it can only apply to the evidence of the command, the seeing the party immediately thereafter touch the notary's pen, or deliver him one for that purpose.

This command must be given in practice to both the notaries, one after the other, and the attestation or docquet of the notaries must bear the command to have been so expressly given, otherwise the omission is fatal to the deed; nor is it suppliable by witnesses, being an essential solemnity, and the very constitution of the deed. To allow it to be supplied by parole evidence, would be to allow a deed to be made by that evidence. The subscription of twenty notaries would not make a deed to be mine. The command then being the essence of the deed, the act of Parliament, with great propriety, required a repetition of it by a visible ceremony; it required that the eye should judge of it as well as the ear, two senses being necessary in a matter of such importance. The Court, however, were pleased to dispense with this form, because a mandate may be effectually given, and subsist independent of it. Notaries generally and properly mention this solemnity of *touching the pen*; the want of it was objected, but, as the statutes are silent upon that circumstance, the objection was repelled; but practice has carefully preserved this circumstance. Additions on the margin must also be signed by notaries,

' tar or nottars to subscribe for him ; and  
 ' the nottars pen, otherways the  
 ' fory to forgery.' According  
 their attests. Sir George  
 nefs subscribing  
 liable to a  
 resolve it  
 M'Ken  
 and  
 qu  
 c'

*from the offices of  
 as the prohibition is  
 of the deeds, so it is  
 they yet might act as com-  
 this is extremely doubtful, and, by  
 for others in any case, is limited to  
 purveyors.*

*Bond*

---

## *Bond of Relief.*

FROM the history of the laws made in favour of cautioners, from the days of Justinian down to the act of Parliament 1695, which was given upon a former occasion, it appeared, that the interpositions of the Legislature to prevent the practice of one man engaging for another, or to relieve the situation of cautioners when engaged, had either been totally ineffectual, or were attended with opposite effects. The money lenders not only eluded these laws, but, by the form and nature of their securities, rendered the situation of cautioners a great deal worse than it had been before the act. Thus, prior to the 1695, cautioners were taken bound expressly in that character, and the bond contained a separate obligation by the principal debtor to relieve his cautioner of the debt. The concern of the granters of the bond being thus *ex facie* apparent, the natural favour due to the cautioner was preserved, and when the creditor put the bond into the register, in order to recover payment, the cautioner took out another extract, and raised diligence in his own name for relief: But, when the act 1695 had introduced a kind of septennial prescription in favour of cautioners, alterations in the form gradually took place, by which the purposes of the act of Parliament have been completely eluded. I am now to state the progress of these alterations in their real order, from the days of St Martin to the present time.

Separate bonds of relief were in use to be taken, a considerable time before the act 1695. Very great inconveniences had been found to attend the other method, whereby the cautioner

was made to depend entirely upon the clause of relief contained in the principal bond, which was not at his command ; and, although he might have just reason to apprehend danger from his debtor's situation, yet he could take no step for his own security ; in short, he must have been actually distressed, and forced to make payment, before he could be in a capacity to act for himself. By our old law, though a cautioner had not made payment, yet, if decret was taken against him, he had an immediate right to adopt the same measure against the debtor for his relief, without paying the debt. When bond debts became more common, a charge of horning was found to be the act of distress, which gave a cautioner title to relief. The reason of this, was, that the bond might go to the register without an intention of recovering the money ; and, therefore, a charge of horning was necessary, to mark the intention of the creditors ; the registration of the bond was afterwards found to be a distress sufficient to entitle the cautioner to seek his relief. The registration was no doubt equal to a decret ; in order, therefore, to avoid these inconveniences, separate bonds were taken by cautioners. As the old style of these deeds differs considerably from the modern form, it will be here necessary to give a short illustration of it.—The bond begins with, ‘ Know all men by these presents, me A. B. Foras-  
‘ meikleas,’ &c. After a recital of the principal bond, and the clause of relief, it proceeds in the following terms : ‘ And I being  
‘ desirous that the said P. D. should sustain no damage, through his  
‘ being cautioner in manner foresaid ; therefore wit ye me to be  
‘ bound and obliged, likeas by the tenor hereof, I bind and oblige  
‘ me, my heirs, executors, and successors, to warrant, free, and re-  
‘ lieve, harmless, and skaithless keep the said P. D. my said cau-  
‘ tioner, of his said cautionry above-mentioned ; and of all cost,  
‘ skaith, or damages he may happen to sustain and incur there-  
‘ thorough, any manner of way ; providing always that thir pre-  
‘ sents, with the clauses of relief above-mentioned, in the foresaid  
‘ bond

rupted or broken. These narratives are also the most unexceptionable materials, or adminicles as they are termed, for supplying writings that are lost, by proving the tenor. These are great advantages; but in a series of papers it must be acknowledged, that long recitals increase in arithmetical proportion, and become tiresome, and even sometimes nauseous. Brevity and conciseness should always be studied, so far as is consistent with accuracy and perspicuity.

'*Therefore wit ye me to be bound and obliged.*'—To *wit*, is a Saxon derivative for to *know*. It is used by Spenser, Shakespear, and by the old Scottish poets. *Witting* was *knowing*; and hence the original signification of the word *Wit*, denoting the intellectual faculties of imagination, and quickness of fancy; nothing remains of the old use of the word, except the phrase *to wit*, used in explanations, for '*that is to say*,' '*Therefore, wit ye me*,' i. e. '*Know all men again*,' which clearly points out the blunder of language which has been explained before. The first address to all men has told them nothing at all; and, therefore, to make common sense, the writer is here obliged absurdly to repeat it. The old Latin address of the notaries was both sense and grammar: '*Omibus ad quos præsentes literae pervenerint, salutem, sciatis quod ego A. B.*' &c. The deed then is sensibly directed to those whom it may concern, and not to all men. The granter salutes them, or greets them well, and then says, '*know ye that I am so and so bound.*' Our old writers by omitting the polite part, which is the salutation, have made nonsense of the first address, and forced themselves to the awkward repetition of *wit ye me*. The writers during the beginning of this century copied these blunders; and we are now but slowly throwing them off.

'*To be bound and obliged, likeas I bind and oblige me, my heirs,*' &c. This repetition in the present tense is a literal translation of the old Latin of the notaries. '*To be bound and obliged*,' relates to the agreement and obligation subsisting antecedently upon the party, independent of the writing; the granter, therefore, acknowledges  
the

' and relieve the said cautioner of the whole contents of the fore-  
 ' said contracts ; and of all cost, skaith, damage, expences, and in-  
 ' terest that they or either of them, their heirs or assignees, may  
 ' any way sustain or incur there-through : They will grant in time  
 ' coming, against the said principal parties, their heirs and execu-  
 ' tors, action at the said creditors instance, their heirs and executors,  
 ' and in their favours, immediately after they be distressed and  
 ' compelled to fulfil the contents of the said contracts, by payment  
 ' of sums therein contained, -or by poinding of their goods or com-  
 ' prising of their lands for payments thereof ; not only for recovery  
 ' of the principal sums contained in the said contracts, but also to  
 ' compel them to repay, with the said principal sums, the whole an-  
 ' nualrents extended to ten for the hundred of all years and terms  
 ' bygone, that the said cautioners have been compelled to satisfy the  
 ' said sums, or their lands or goods have been comprised and poind-  
 ' ed therefore ; and also, to content and pay to the said cautioners,  
 ' their heirs, and executors, yearly and termly, in time coming, ten  
 ' for the hundred ; aye and while the said principal sum be repaid  
 ' to them and their forefairs.' The want of this clause was ob-  
 jected to a cautioner in the 1629, because the obligation bore only  
 that the principal should relieve his cautioner from the premises in  
 the bond, which was only principal sum and penalty, and that it did  
 not relieve him of all *costs, skaith, damages, and expences*, which the  
 cautioner might have incurred. The Lords, however, found the  
 principal obliged to pay the distressed cautioner both the principal  
 sum and the annualrents \*. Although bonds of relief carry all cost,  
 skaith, damage, &c. yet the Lords interpreted the same only to ex-  
 tend to the principal and annualrents ; so that, although a cautioner  
 be denounced, and his escheat fall, his lands be comprised, &c. yet  
 the principal will be only obliged as above. In a case, however,  
 where the cautioner's lands were comprised for the principal sum,  
 annualrent;

\* 4th December 1629, Laird of Cockpule against Johnston.

debtor, who stood only bound *ad factum praestandum*, i. e. the relieving of the cautioner ; but, as formerly observed, this could not be done till distress or actual payment of the debt. Thus an apprising was found null, because it had been led, not by the creditor, but by the cautioner upon his bond of relief, before he was either distressed or had made payment \*. This opinion was afterwards altered ; a Writer to the Signet gave in a bill, craving an adjudication upon a bond of relief, though there was no distress. The clerk to the bills hesitated, and moved the matter to the Lords. The Lords allowed the extract of the adjudication to go out, with this quality, that it should not take effect till distress †.

These inconveniences plainly shewed the bond of relief, as then taken, to be defective in form, and insufficient to effectuate the indemnification proposed by it. The first improvement devised for this purpose, was a clause in the following terms, which immediately followed the general obligation : ‘ And for that effect to obtain  
 ‘ and report to the said D. and his forefairs, the above-mentioned  
 ‘ bond unregistered ; or else a full and sufficient discharge, duly  
 ‘ subscribed ; the sums principal, annualrents, and expences therein  
 ‘ contained ; and of the said bond itself, hail heads, clauses, and  
 ‘ contents thereof ; with all clauses requisite and needful ; and that  
 ‘ betwixt and the term of ————— next, with the sum of  
 ‘ ————— money foresaid, of liquidate expences, by and attour  
 ‘ performance of the obligation of relief, report, or discharge above  
 ‘ specified ; and together with,’ &c. We find an instance of this in a decision of a pretty early date. It is thus marked in the Dictionary, p. 127. ‘ A bond of relief was found to be the ground of  
 ‘ a charge, though no distress was produced, it bearing an obligation to pay at a certain time ‡.’ The hint given in this decision  
 seems

\* November 1686, Dickson against Govan.

† November 20th 1685, Burnet against Veitch.

‡ Gosford, 7th July 1668, Paton against Paton.



performance of a fact ; which could with propriety afford nothing but diligence against the person of the granter. A pouding could not yet proceed upon the bond of relief ; nor could arrested goods be made forthcoming ; because, by the nature of these executions, they can only take place for liquid debts in the person of the creditor. A very obvious alteration in the bond of relief was sufficient to give them this material advantage ; and yet no deeds of that kind, containing such an improvement, are to be met with anterior to the year 1730. Before that period, cautioners were often cut out by other creditors ; because it behoved them to recover a decree in consequence of their distress, or, *de facto*, to pay the debt, before they could secure themselves upon the estate of their principals. About this time, some man of business fell upon the very natural thought of binding the principal to make payment to the cautioner himself of the debt in the relative bond, and that at the very same term of payment therein mentioned, in order that it might be in his power, if he pleased, to retire the bond himself. This gave perfection to the bond of relief ; it put it in the power of the cautioner to secure himself at any time when he thought proper, without being distressed, or paying up the debt himself.

In a modern form, published in Spottiswood's Styles, we may observe all the progressive steps and improvements of the bond of relief, standing as it were in the order of their introduction ; and it is by tracing the improvements made in our deeds from time to time that we can alone arrive at the true reasons and principles of our forms, and at a perfect understanding of their legal import. This bond being published, as the editors of Spottiswood declare, by a gentleman of eminent knowledge and practice in business, it may be observed from the Register, that several people, trusting the word of the bookseller, have condescended to follow the same style in their practice. Though it does contain the modern improvement in the matter of relief, it is a confused form, exceptionable both in grammar and sense, and, what is worse, it is materially wrong. The principal

and arrestment. Of this a particular instance may be given. James Beveridge had become bound for Jamieson in one thousand pounds Sterling, and had taken a bond of relief. Beveridge had early notice of Jamieson's bad circumstances, and had given him the first charge of horning. Several other charges of horning followed; upon which a meeting of the creditors was called. Upon production of the grounds of debt, it appeared that, from the erroneous conception of Beveridge's bond, he could not poind; in consequence of which his debt was postponed. The fact came out to be, that Beveridge and Jamieson had some how or other got hold of an old fashioned bond of relief; and, in order to save writers fees, Jamieson cunningly copied a bond in the same form for his friend; which taught him a lesson at a very high price. Were the example of these people to be copied by others, more law-pleas would arise in one year than are at present produced in twenty.

Where there are several cautioners in a bond, if the sum be large, each of them takes separate bonds of relief; but, in smaller debts, the bond is lodged with one of them, who grants an obligation, generally in the form of a missive-letter, to produce it on demand: for the debt may be required from any one of the conjunct obligants; and therefore each of them is entitled to act for his own safety, independent of the rest. In case the debt is paid by any one person, the law establishes for each of them relief *pro rata* against his neighbour, without any special proviso or agreement to that purpose.

If the cautioner is averse to distress the principal debtor himself, and at the same time wants to get clear of the engagement, he has the direct method of bringing the matter to a point. He intimates his bond of relief, under form of instrument, to the principal creditor, which gives a commencement to the septennial prescription introduced by the act 1695. Intimations of this kind, as observed before, have the effect to bring on the immediate demand of the debt; and it is the duty of the agent for the principal creditor not to let it lie over for a variety of accidents, may concur to put these intimations,

\* period \*.' No renewal of the cautionry obligation is to be trusted to ; nay, not even an express renunciation of the benefit. All other advantages introduced, either by the Roman law or ours, have been defeated by renunciations ; but that is not the case with the septennial limitation. A creditor imagined that he should retain his security, by making the cautioner annex a docquet at the foot of the bond, ' dispensing with any benefit he may have by the act of parliament 1695, anent the prescription of cautionry obligations, ' and declaring himself bound notwithstanding thereof.' It was pleaded for the charger, that a man might renounce any benefit introduced by law in his own favour ; but the Lords found that the cautioner could not dispense with the act of parliament †.

A decree taken against the cautioner within the seven years will not preserve the debt ; the debtor is as much bound by the bond as he can be by the decree ; it is diligence alone that, by the act, is sufficient for the purpose ; and even that diligence will only secure the special subjects thereby affected. Supposing, therefore, you had adjudged a particular part of the cautioner's estate, or attached a special sum or moveable by arrestment, without doing diligence by horning against his person ; all that you could do, after the elapse of the term, would be to recover the particular subjects adjudged or arrested ; and, if you failed in that, the debt was gone. The essential diligence, therefore, is by horning denounced and registered, which preserves the debt itself against the cautioner's representatives, that is, the principal sum and interest due within the seven years.

Several disputes have occurred respecting the mode of intimation, i. e. whether equipollents, or the private knowledge of the debtor in the principal bond were sufficient ; but it is an established point that private knowledge will not do. However, it is advisable for the principal creditor who lends the money to keep himself in a convenient ignorance of the situation of the obligants ;

\* Page 531.

† Edgar, Feb. 19. 1724, Norie against Porterfield.

---

---

### *Assignment.*

THE next deed in the practical order is an Assignment of the Bond. This happens most frequently when the credit of the granter is unexceptionable. Then, the bond passes from hand to hand like a sum of money. It happens also in a hundred other cases daily occurring. Our lawyers have often been surprised at the singularity in which the style of the Assignment is conceived. In place of words importing a *simple conveyance* of the debt by the granter to the receiver, the latter is constituted a *cessioner and assignee* in and to the money; he is substituted in the place of the former, and vested with special powers for recovery of the debt: And it is this particular style which, in our practice, characterises an assignment. The preservation of original forms, as observed upon another occasion, however uncouth they may appear in modern times, has, in our neighbouring kingdom, preserved the history of their law almost entire. When the original progress and principles of a deed are known, there can be little difficulty in fixing the present import of it. The assignment is one of the few writings relating to personal deeds which has come down to us in its primitive form, and therefore we are enabled to give a distinct account of its progress. The history of this deed affords an irresistible proof that the law of the whole island was originally the same.

In place of the *nomina debitorum*, by which title the Romans distinguished all debts or claims constituted by obligation, contract, or other writings,

‘ to another ; in which manner is used also the words *assignee*, *assignatus*, for one that is deputed or appointed by another, to do any act, or perform any business, or enjoy any commodity.’

Practice has taught us, in Scotland, to consider the word *assignee* as applicable only to personal rights. This, however, is a mistake ; it was introduced originally in heritage, and only afterwards applied to denote that particular kind of attorneyship which the common law rendered necessary for the transmission of *chofes in action* from one man to another. In heritage, we have retained the words in its original sense—‘ *Ex usu nostro (says Craig) assignatus idem est cum singulari successore.*’ By our practice, an assignee is the same as a singular successor.

The civil law drew a different consequence from that which we have heard as to their *nomina debitorum*. ‘ *Rem in bonis nostris habere intelligimur quoties ad recuperandam eam actionem habemus.*’ This kind of possession, then, might be given up to another, as well as any thing else, *in bonis* of the party ; and this, in the civil law, was called *cessio*. ‘ *Assignations (says Lord Stair) are more frequent with us than anywhere else. There is scarce mention thereof in the civil law.*’ ‘ *Personal rights (he observes) are sometimes uncommunicable, yea generally all obligations are intransmissible, upon either part, directly, without the consent of the other party ; which is clear upon the part of the debtor ; who cannot, without the consent of the creditor, liberate himself, and transmit his obligation upon another, though, with the creditor’s consent, he may by delegation. Neither can a creditor force his debtor to become debtor to another without his own consent, as when he takes him obliged to pay to him or his assignees ; yet, that obligations may become the more useful and effectual, custom has introduced an indirect manner of transmission thereof without the debtor’s consent, whereby the assignee is constituted procurator ; and so, as mandator for the creditor, he hath power to ex-act and discharge ; but it is to his own behoof ; and so he is also*

‘ *denominated*

' more recoverable than assignments, which, by their nature and  
 ' style, are procuratories by the cedent to the assignee *in rem suam* ;  
 ' for debtors are not obliged to pay to any other but the persons  
 ' mentioned in the obligations, or their heirs, which, *fictione juris*,  
 ' are esteemed the same persons with the creditors ; and therefore,  
 ' unless the obligation bears expressly to assignees, the debtor is not  
 ' the assignee's debtor ; and so the assignee obtains payment, as  
 ' being the procurator or mandator of the creditor ; yet the man-  
 ' date is not revocable by the death of either cedent or assignee, e-  
 ' ven by our own former custom \*.' This former custom had its  
 rise from a source which has not been mentioned by any of our writ-  
 ters, and which, notwithstanding, can with certainty be disclosed.  
 The French, who are governed almost by the letter of the Roman  
 law in every thing respecting moveables, found nothing in that ju-  
 risprudence of Lord Stair's objections, raised upon the presumed  
 form of ancient obligations, which discharged the direct transmis-  
 sion of *nomina debitorum* of rights and claims of all kinds to be *in*  
*bonis* ; which is another word for being in possession. And they also  
 found that the Roman creditors very often substituted others in their  
 place, by delegation. The French admitted the practice of delega-  
 tion, upon condition that it was done by writing ; and, at the same  
 time, in order to avoid the necessity of procuring the debtor's con-  
 sent, they also introduced a direct conveyance of the debt or right by  
 one man to another, which was termed *un transport*. He who made  
 the *transport* was called *cedant*, and he who received it *cessionaire*.  
 This French deed was a direct conveyance, without the fiction of an  
 attorney, or any other fiction ; and the terms adopted are evidently  
 expressive of its nature. In the reign of the James's, particularly in  
 the reigns of James IV and V. our ancestors in Scotland grew im-  
 moderately fond of every thing that was French. Our writers, our  
 lawyers, and our churchmen, had their education at Paris, and vied  
 with each other in importing the Gallic manners and customs, parti-  
 cularly

\* Page 788.

place. Though our lawyers adopted the principles of the French transport, they could not, for some time, get quit of the ancient principles which remained in our practice, and were supported by the style of the deed. It is these changes in our law, these mixtures of principles, which render the practice and decisions of our Court, in the days of James V. Mary, and James VI. so contradictory, and to us almost inexplicable. Some of these consequences reached down to our own times.

Notwithstanding the effect given to an assignment by intimation, it was a long time before the Scots assignee could execute any decret in his own name, which had been obtained in the name of the cedent. The first remedy applied to this was to consider the assignee as a singular successor, and to allow him the benefit of a decret of transference active, for transferring into his own person the right and title of the decret pronounced in favour of the assignee; an effect which his deed and intimation did not bestow. This was evidently to consider the assignment as a mandate, according to the original idea of the national customs, and to admit it to be a procuratory also *in rem suam*, in terms of the civil law. As such they held it to be sufficient to convey the right; but still it was but a procuratory; and therefore it behoved the party to act in name of his constituent. Although this form was altered in the time of Sir Thomas Craig, the point appears not to have been well established; for we find it brought under trial a little after his death. ‘It was objected to an assignee, that he could not do diligence in his own name upon a decret obtained by his cedent; but the Lords found, “That the assignment being intimate in the cedent’s lifetime, the assignee was under no necessity to transfer the sentence, but might lawfully proceed by letters of horning upon the said intimation so intimated, without any transferring, or other action \*.” If, however, no information happened to be made during the life of the cedent, the assignee could do nothing in his own name. This is so

\* Durie, Feb. 3. 1624, Stevenson against Craigmillar.

under the idea of assignments being merely procuratories. The act 1690, however, gave them relief, in so far as respected special assignments. Thus matters continued until the act 15th of the 3d session of William and Mary's first parliament, 1693. This statute keeps the mandate for registration in force, and empowers the parties interested to register them, i. e. to obtain a decree of registration after the death of the grantor or mandator, contrary to the nature of mandates, which by law fall upon the death of the grantor. The act provides : ' That this registration shall only take place ' upon production of a service or retour, in case of bonds or other ' writs heritable, or a confirmed testament, containing the bond or ' other writs, in case they be moveable, or of a special assignment, ' though not intimated in the case of either.' The act then proceeds : ' And, further, it is statuted, that, if it shall happen the pur- ' suer to decease, at any time during the dependence of any process ' raised at his instance, there shall be no need hereafter for his heir, ' executor, or assignee, to raise and obtain a transferring active : But ' the said heir, executor, or assignee, is hereby allowed, upon pro- ' duction of his service or retour, confirmed testament, or special as- ' signation, though not intimate, to insist in the principal cause.'

Upon this statute, several observations occur. Practice, it will be observed, has very much varied from it. The act considered the registration of a deed in a very solemn light, in the light of a regular decret ; and therefore, before we could put the obligation of a dead man upon record, in terms of this act, we ought to produce to the keeper of it the service, the retour, the confirmed testament, or the special assignment. The profits of registration induced the keepers of the records to ask no questions, but to register, without ceremony, any deed put into their hands. In place, therefore, of shewing these titles to them, we produce them at the Bill Chamber when we come to raise diligence in the name of the heir, the executor, or assignee. This act considers a special assignment in the same light as it considers a service or retour, i. e. as vesting the full right of the subject, or, according to the civil law term, the *jus crediti*, in the person



person of the assignee, which is precisely according to the idea adopted by Sir Thomas Craig, of holding the assignee to be a singular successor of the defunct. A service or a confirmation operates as a complete transmission in favour of the heir or executor ; and all of them, anterior to this act, needed judicial decreets of transference to vest them in the person of the heir or the executor. The statute only concerns special assignments ; so that general assignments stand upon the same footing as they did before the act, and consequently, strictly speaking, need an action of transference to vest any particular right or action in the person of the general assignee. Practice, however, has dispensed with it \*.

Upon

\* The 39th Article of the Flucidations of the late learned and very ingenious Lord Kames is intituled, ‘ Commentary upon the act 35th Parl. 1693, concerning Procuratories of Resignation, and Precepts of Sasine.’ His Lordship, in explaining this statute, has confounded it with the former one in the 1690, ‘ Anent the Confirmation of Testaments.’ After giving an account of what he supposes to have been the former practice, in the matter of assignments, he proceeds in these words : ‘ Thus stood the law down to the year 1693, when the act of parliament under consideration was made, authorising procuratories of resignation, and precepts of sasine, to be executed, after the granter’s death, and also authorising special assignments *à l’instimé* after the cedent’s death. The privilege was not extended to general assignments, which, as observed above, require confirmation. To make this statute accord with principles, has not been attempted by any writer ; nor does it seem to be an easy task ; for surely the Legislature could not mean to empower one to act *procuratorio nomine*, without a constituent. I understand the statute as empowering these several acts to be done not *procuratorio nomine*, but by express authority of the statute itself†.’ Now, there is not one word about assignments, either general or special, in the statute, as referred to by his Lordship ; it solely respects procuratories of resignation and precepts of seisin, which, till that time, were considered as *personal mandates*, and fell upon the death of the granters. The principles of this statute are entirely inapplicable to the former one about assignments. Though Lord Kames, by blending the statute together, imputes a mistake of principle to the legislature, of which it stands entirely clear. ‘ There seems (says his Lordship) to have been no occasion for a statute with respect to the case last mentioned. The simple addition of the word *assignees*, in a money-obligation, removes all difficulties. Were our forefathers so defective in invention, as to overlook an improvement so obvious ? If I bind myself to pay a sum to John, I am not bound

A à 2

‘ to

† Eluc. p. 320.

Upon looking into Spottiswood's Introduction \*, we find the following definition : ' An assignation is a writ of conveyance, and ' applied only to such as relate to moveable sums, rents, or duties ; ' for, when other moveable goods, as plenishing, merchandise, or the ' like, are conveyed, the writ is called a *disposition to moveables*.' This definition is practically just, and it is exceedingly curious. Spottiswood does not so much as give a hint at the reason of the distinction he makes, but presents it without a difference. We here see the ancient law

' to pay it to James ; but, if I bind myself to pay it to John, or his assignee, the bond ' has a free circulation. The assignee can assist against me in his own name, without ' needing a procuratory ; he can intimate his own name, whether the cedent be dead ' or alive ; and his discharge to me in his own name extinguishes the debt (p. 321.)' In a preceding paragraph, his Lordship had informed us, ' That an obligation for a ' sum of money, without mentioning assignees, is not assignable. To supply that want, ' a method was invented to assign it indirectly, by giving a procuratory to the assignee ' to use the cedent's name in demanding payment. But this was an imperfect method. ' If the cedent died before intimation, the procuratory died with him ; and the assignee's only resource was a process against the cedent's representatives to make up a ' title to the subject assigned, and to grant a new assignment. Intimation during the ' cedent's life was indeed held sufficient to transfer the *jus crediti* to the assignee, entitling him to drop his character of procurator, and to act in his own name (p. 319.)' His Lordship is here certainly mistaken, both in law and in fact. It was not the want of the word *assignees* which, in our law, gave birth to the invention of conveying by a procuratory. The word *assigns* is to be found in heritable rights at the earliest periods ; nor were our forefathers defective in invention upon this article ; but it was the law itself, that, upon a principle of public utility, discharged the conveyance of debts, or rights in action, from one man to another. The addition of the word *assigns*, therefore, though it might have met the objection deducible from the Roman law, to which Lord Kames alludes, would not have had any effect upon the law of this island ; for, though bonds have all along been taken payable to assigns in England, yet the assignee cannot, at this moment, insist in his own name, he must still recover under the title and quality of an attorney. As the specification of assignees did not remedy this affair in England ; so, after the assignation in Scotland came to be considered as a direct conveyance, the want of that word did not hurt the deed ; and so, in the last century, it has several times been decided. Besides, the very word *assignation*, in its original import, does not mean a conveyance, as Lord Kames supposes, but an appointment or constitution for a particular purpose.

\* Page 71.

law of the island surviving only in form and words ; and we see our practitioners obliged to use differences in styles, and in titles, where they acknowledge none in reality. The true causes of the distinction are only to be found in the history of the deed. All rights and debts, or, as the English say, *choses in action*, are still with us, as they were of old, conveyed by a writ under the form of a procuratory or attorney, and under the ancient title of assignment, which denotes the nature of the writ ; while all other goods, or moveable property, which are not *choses in action*, but in the possession of the party, are transmitted by a deed of direct conveyance, under the title of a *disposition of moveables*. The style of the first is, to constitute an assignee ; but, by the other, the granter at once sells and disposes \*. It is proper, therefore, to keep up a distinction in terms between

\* Mr Erskine expresses himself upon this subject with a remarkable degree of doubt and timidity, and takes up the common, and (if I may use the expression) erroneous notions of the matter : ‘ Though the terms *disposition* and *assignment* (says he) may be either of them apt enough to express the alienation of any right whatever, yet, in their common use, conveyances of debt, or of particular moveable subjects, go by the name of *assignments*. The property, indeed, of a number of moveable subjects, considered as an *universitas*, ex. gr. household stuff, is sometimes said to be transmitted by disposition ; but that word, in its proper sense, is applied only to the grant of heritable subjects, and is a deed containing procuratory of resignation, and precept of sale (Page 281.)’ The conveyance of a particular moveable subject does not go by the name of *assignment*, but is called a *disposition*. Suppose the sale of a carriage and horses, and a deed necessary to explain the transaction, the seller would not constitute and appoint the purchaser his lawful assignee in and to this carriage, with full power to drive it where he pleases, &c. he would sell and dispose it to him, and the writing would with propriety be called a *disposition*. A man may act as a procurator, or in name of another, in recovering a debt, or claiming a right ; but, in the purchase of moveables, which are instantly delivered to him, he certainly acts for himself, and takes direct possession, which puts an end to the business. Mr Erskine, indeed, says, that, where a number of moveables, such as household stuff, are to be transmitted, it must be a disposition, because they are considered as an *universitas*. It is not easy to conceive what is here meant by an *universitas* ; but certain it is that our forefathers did not make the distinction between the disposition and the assignment upon that account.

The

between deeds which have a separate mode of execution. Where moveables are transmitted, and require possession and delivery, let us term the deed a *disposition of moveables*; and, where debts, rights, or actions, are to be made over, and which can only be completed by intimation, let us continue to term them *assignments*.

We now come to the style itself, as given us by St Martin. He supposes the bond to have been registered, and therefore he begins with a recital of the deed, and the decret of registration. Next follows the cause of granting, which is always in the form of a subsumption or inference.

‘*Made payment to me of a certain sums of money.*’—This, in general, continues to be the common expression in assignments of debt at this moment. Few people purchase the debts of others, but, upon getting a deduction of the amount of the debt; and this was the method taken to express the diminished value given. The law therefore presumes, in every case where these words occur, that the full value has not been paid; a circumstance, however, by which the transaction is not materially hurt. Some writers, wishing to intimate that their clients took no advantage, express it in this manner: ‘For a certain sum of money, equivalent to ‘the sums after assigned.’ This is assuming an air of mystery, without any reason, and concealing that part of the transaction which it is the interest of the purchaser to make known. Bonds, in the present practice, go often from hand to hand by assignment; and, when full value is paid, the best way is to express it in one sum, which commensurates of itself with the debt assigned, better than any writer can make it do by words. It sometimes, indeed, happens, that the debt is assigned by a kind of barter, for an illiquid consideration; then it is certainly right to mention that such consideration is held to be fully equivalent in value to the debt assigned.

‘*Made*

The word disposition, in its proper sense, is not applicable only to heritable subjects; we shall prove, in the proper place, that it was originally used in our law for transmission of moveables, and was only applied to its present practical use after the feudal charter grew less frequent, and heritage became an object of daily commerce.

' *Made, constituted, and ordained, and by thir presents make, constitute, and ordain, the said W. G. his heirs and assignees, my very lawful, undoubted, and irrevocable cessioners and assignees, in and to the said sum of ——— of principal,* ' &c.—Here is the pure old English style of an attorney. They said, and still say, *have made, constituted and appointed, and by these presents do make, constitute, and appoint, J. B. of, &c. my true and lawful attorney, &c. irrevocable for me, and in my name, to ask, require, &c.* So far the style of the English and Scotch is the same, word for word. When our forbathers came to consider an assignment, not as a mandate, but as a real conveyance, they added the word *irrevocable* to *cessioners* and *assigns*; so that we see *cessioners* and *assigns*, at a former period, had been revocable at the pleasure of the constituent.

' *In and to the said sum of ——— as principal.* '—The English assignment has no such expression; the cessioners and assignees are there constituted, not in and to the debt, but to ask, require, and demand the same. The phrase, *in and to*, is absolutely inconsistent with the appointment of an attorney; they are a part of the French transport or direct conveyance introduced into the old form, when it came to be considered as a direct conveyance.

' *And in and to the foresaid bond, decret interponed thereto,* ' &c.—The same may be said of this part of the deed. *Nomina debitorum*, or grounds of debts themselves, could be ceded by one man to another by the Roman law, and were considered in several views distinct from the right which they created to the debt. Hence, in France, and in Scotland, we continue to make a distinction between the right of the debt itself, and the instruction of it; and that is the reason why, in all cases, we find first the bonds, bills, and other instructions of the debt, as a separate kind of property, and then the money contained in or due by them.

The English never admitted these distinctions of the Roman law, and therefore know nothing of this form. The grounds of debt, with them, are considered in no other light than as evidences of the claim

*' Which assignment, I bind me, my heirs, and executors, to warrant.'*—We shall not here enter into the etymology of warrandice, which more properly belongs to heritable rights. We shall only observe, that so soon as deeds come to be executed in writing, the seller of the land, or the seller of the moveables, were taken bound in warrandice to the purchaser or the buyer. Only, in the sale of goods, cattle, or personal effects, the warrandice was understood to extend no further than to the title of the seller; and not to the quality of the goods, of which it behoved the purchaser to judge for himself.

The import of warrandice in the conveyance of debts, does not seem to have been fixed even at a very late period of the law, as is clear from the following question put by Sir Robert Spottiswood. *' How far one is obliged to warrant the assignment of a bond, &c. made by himself to another? Whether that it is truly owing by the debtor simply, or that it is both owing, and that the debtor is responsal? This was drawn in question by Alexander M'Nag- when and Giles Carlon; but the parties agreed between themselves, 4th February 1632 \*.'* This indetermination of the law upon so material a point, is the reason why the import of the warrandice in St Martin's assignment is explained by the clause beginning with *' that is to say.'* This doubt in the author's time came to be cleared up; but not sooner than the 1671. At that period there were three different kinds of warrandice used in assignments, the first was simply from the fact and deed of the granter, such as we find in St Martin's assignment, where the bond is directly granted to the assignee. And, therefore, there could be no other facts or deeds to guard against but his own. The second was, where the bond had gone through several transmissions; and might be affected by the facts or deeds of the intermediate holders. Here the writers properly and justly took the cedent bound in warrandice, not only

VOL. I.

B b

against

\* Spottiswood Pract. p. 21.

claim or action and to go along with it, without any speciality in the deed.

' *And I have surrogated, and by these presents surrogate and substitute, the said W. G. and his foresaids, in my full right, vice, and place of the premises.*'—Our assignation is a strange compound. This clause was taken by the French from the Roman formula of delegation, and has been by us *verbatim* copied from them. It is perfectly opposite to the language and principles of a procuratory, because a procurator or attorney only acts for and in the name of another. Delegation, in general, say the French lawyers, is the act by which one man substitutes another, either in his place, or in a debt. Except in the matter of bills, we know nothing of delegation in Scotland; but our forefathers were pleased to enrich the form of the assignation with the language and the style of it.

' *With full power to the said W. G. and his foresaids, to intromit with, ask, crave,* &c.—Here, again, is the original style of the power of attorney almost *verbatim* from the old English assignment, and quite inconsistent with the immediate preceding clause of surrogation; for, if the right itself be conveyed, the former owner has no title to grant further powers; all these are included in the conveyance itself; and therefore, in a case observed by Lord Stair, where a bond was assigned, both against principal and cautioners, but the cautioners were omitted in the clause 'with full power,' no special power seemed to be given against them. The Court repelled the objection, because they thought the clause itself of very little consequence \*. In this clause, however, we find the old powers absolutely necessary in an English assignment, I mean that of pursuing in the name of the assignee, which, in some cases, is still convenient to be done. By an old decision, we find that a cedent disclaimed the process brought by the assignee in his name; because the clause we are talking of did not contain a special liberty for that purpose. The Court, however, with great propriety, found that the assignee might use his name whether he would or would not †.

' *Which*

\* Page 381.

† Hope, 20th Nov. 1621, Grierison against Maxwell.

against his own ; but his author's facts and deeds. At other times, whether from the ignorance or inattention of the conveyancer, the assignment was warranted like a charter or disposition in heritage, to be good, valid, and effectual, at all hands, and against all mortals, which is termed absolute warrandice. Sometimes, it appears, that this clause was inserted in consequence of an agreement between the parties ; and was expected to take place *in terminis*. In a case mentioned by Stair, Sir Robert Barclay accepted of an assignment to bond from Robert Liddel. The deed contained absolute warrandice ; and the debtor having failed, Sir Robert charged the cedent. The Lords found, ' That such clauses of absolute warrandice do not import that the debtor was solvent at the time of assignment, but only that there was no exception that could defend him either from the cedent's deed or otherwise \*.' The decision has established our rule of practice in this point. It was in entire conformity to the maxims of the Roman law. The granter of a conveyance of a debt is bound in no higher warrandice, than that the debt is legally due ; he is not to answer for the solvency of the debtor, unless it be so specially agreed. Now it has also been determined by the Court, that an agreement of this kind will have the proper effect. An assignee did not attempt the recovery of a debt for six years after acquiring right to it, the debtor then failed, and an action was brought upon this special warrandice. The cedent did not dispute that he was bound to answer for the solvency ; but he contended, that his obligation related to the debtor's condition, at the date of the assignment. The charger insisted, that the warrandice inferred the actual recovery of the debt at any time when demanded. The Court found, ' That this clause imported the solvency of the debtor ; but that the same was presumed, unless it were proven that he was a notor bankrupt, or that the assignee using diligence did not recover ; and if responsibility be alledged, allows the cedent

' to

\* Nov 24. 1671, Barclay against Liddel.—Stair.



‘ to condescend upon any visible estate he had to effect the  
‘ same \*.’

From these premises, we see that there are four different kinds of warrandice proper to assignments : First, From the fact and deed of the cedent ; Secondly, From the facts and deeds, not only of the cedent, but of his authors ; Thirdly, From facts and deeds, and from legal exceptions against the debt ; and, Fourthly, The solvency of the debtor, or the absolute assurance of the assignee’s recovery thereof. These form a kind of scale, rising above each other in importance, and therefore it is our proper business to stipulate the one or the other, according to the nature of the transaction, and the agreement of our employers.

We have now only to mention the case where the clause of warrandice has been entirely omitted. This was tried upon the 4th March 1707, Riddle against White. The Lords found, ‘ That  
‘ Whyte’s assignment to Creighton, though it bore for onerous  
‘ causes, yet, having no warrandice, could not be interpreted to  
‘ imply absolute warrandice, but only from fact and deed, which is  
‘ the common natural warrandice inserted in assignments to debts or  
‘ decreets. For the brocard, that no warrandice must be understood  
‘ to be absolute warrandice, must be applied according to the nature  
‘ of the right. If it be a sale of lands, for onerous adequate cau-  
‘ ses, then it holds ; but not in assignments to personal rights,  
‘ though it should at least import *debitum subesse*. And here there  
‘ was no debt at all, he having, on his being reponed to his oath,  
‘ deponed negative ; yet, at the time of White’s assignment, there  
‘ was a decret standing, though afterwards annulled, *quod sen-  
‘ tentia judicis pro veritate habetur*, till it be reduced and taken  
‘ away †.’ When no warrandice is expressed in a deed, and the warrandice is said to be implied, the implied warrandice in an assignment, where the clause is omitted, is, by this decision, limited to simple fact and deed.

B b 2

‘ Likeas,

\* Feb. 7. 1678, Stewart against Melville.

† Fount. Vol. ii. p. 354

*' Likeas, I have instantly delivered to the said W. G. the foresaid registered bond, to be kept and used by him and his foresaids in time coming.'*—A declaration of this kind is extremely useful, and in practice never omitted. This clause fixes upon the assignee, or other receiver, the particulars of the grounds of debt conveyed, and entirely cuts off the pretence of their not being delivered. Before this clause was devised, the principal disputes, in matters of warranty, turned upon the delivery of the papers, which were affirmed or denied by the parties, as their interest directed. A writer, therefore, must take care to allow no paper to be fixed upon him but what he actually receives, to specify those received in this clause, and to take a particular obligation for the production of others necessary, within a fixed time, under a penalty, and a declaration, that, if the want of them shall be objected, in the recovery of the debt, the cedent shall be liable in the consequences.

Having thus analysed the old style given by St Martin, it only remains to be observed, that the modern assignment differs from it only in the abridgment of the several clauses; and that, in place of reciting the bond, the deed is sometimes shortened, by assigning it directly, and thereby saving the repetition.

## INTIMATION.

The moment we receive an assignment, it is our business to have it intimated to the debtor with all despatch; for, till then, nothing is done. It was formerly observed, that the intimation, and its effect, were borrowed from the French, and that it put an end to the ancient construction of our assignment; for, from the moment of the intimation, the right to the debt passed to the person of the assignee, who thenceforth did not act as a procurator, but in the same manner as a French cessionary in consequence of his transport. These rules were established with us in the fifteenth century, as appears from

from Balfour \*. By a decision, also there mentioned, in July 1558, we have the exact form prescribed. It is as under : ‘ Gif ony person havand, be gift of the superior, the marriage of ony air, he sould lauchfullie intimate the samin to him, viz. he or his procurator sould come to the personal presence of the heir, and uther read his gift, or give and deliver him ane copie thereof, and tak an instrument in the hands of an nottar thereof; for, gif he or his procurator pass to the personal presence of the heritor, and expone to him be word that he has the gift of the marriage disponit to him be the superior, or that he is cessioner and assignee lauchfully constitute be the donator thereof, and makes intimation to him of the samin; the samin verbal intimation maid, *nuda voce*, is not sufficient; and therefor, albeit the heir marrie without consent of the said donator, or his assigney, he sould not be compellit to pay to him the double avail of the marriage, but the single avail allernarlie, 1558; the Abbot of Coupar donatour, against the Laird of Duffus. And the like to be observit in all intimations of any uther richts, evidendis, or titles.’ There is a circumstance in the form thus prescribed, which of itself directly proves from what quarter it came to us, I mean the alternative of reading or giving a copy to the party; which was, at this period, and still is, precisely the rule in France. In Craig’s time, the effect of intimation seems to have been perfectly settled. The form he prescribes is the same with that of Balfour; only, by that time, the giving of the copy seems to have given place to the reading. The legal effect also appears to have been settled. Intimation, even then, was not merely a notice to the cedent, but an essential solemnity in the transmission.

We must here remark a very great omission in the work of our formalist, Mr Dallas of St Martin. Though he gives the assignation, and subjoins practical remarks, he has totally neglected to give the form of the intimation, or even to mention the necessity of it, for completing the deed, which is certainly one of the greatest faults

faults to be met with in his book. Lord Stair's conjecture, it may be also remarked, about an intimation being only necessary at first to put the original creditor in *mala fide*, has no foundation in the history of our law. It might have been so originally in France; but certain it is that the act was adopted by us as an essential requisite. In this he has been followed by all our after writers; and, so far has our Court been swayed by the same idea, that they admitted notice by equipollents, and have thereby occasioned a prodigious number of questions, which might have been totally excluded, by adherence to the form and to the law of the country from whence we had the form improved to our hand. In France, nothing will do but a solemn act of intimation; as no equipollent with us will supply an instrument of seisin. Even an action brought upon the assignment will not be sufficient to transmit the right, until the party appear in that action, and actually sees the assignment. Each case, therefore, falls with us to be determined by its own circumstances; but, as that is a matter of pure law, it is not within our province, or within any rule of practice. Our business is to adhere to and understand the established forms, and not to trust to what the Court may receive as equivalents in their place. So far it is established, that the private knowledge of a debtor, of an assignment being granted, will have no effect; nor is it expedient that it should; for, otherwise, a general defence would be afforded to all debtors. They might, in every case, pretend that the debt stood assigned to third parties, and obtain delays upon that head. It is necessary, therefore, that debtors should be furnished with some immediate evidence of the fact, in order that they may instantly produce or condescend upon it.

The form of the intimation we are to analyse, is taken from the Office of a Notary Public, a book of considerable merit of its kind.

'At, &c. appeared A. as procurator for the within designed B. whose power is sufficiently known to me notary public.'—The intimation is made, not in the name of the cedent, but in the name of the assignee. Had Lord Kaimes deigned to consult this humble performance,

performance, he would not have fallen into the error which he has done in his Elucidations. ‘ The intimation (says his Lordship) must be in the cedent’s name, as the assignee has nothing to say to the debtor but *qua procurator* ; and his process against the debtor for payment ought to be carried on in the same character \*.’ His Lordship has, in this place, drawn the fact from his principles, in place of drawing his principles from the fact. We borrowed the intimation from France, where a conveyance of debts or rights was never considered as a procuratory ; and therefore the act is done, not in the name of the cedent, but in the name of the assignee. We find it prescribed in the ancient form given by Balfour ; and so it has ever since been practised.

‘ *Whose power of procuratory was sufficiently known to me, N. P.*’—This circumstance, of old, was material to the form ; because, unless the intimation had been made by order of the assignee, it was attended with no effect. A special separate power, therefore, was requisite ; or, at least, that the notary should hear the order given, and mention his knowledge of it in the instrument ; for a stranger might be possessed of the assignment by accident. Hence we find, by an old decision, that an instrument of this kind was on that account set aside. Upon similar principles, the Court afterwards reduced another intimation, because the same person was both notary and procurator ; for the Lords found, ‘ That the business ought to have been perfected by two distinct persons ; and that one and the same person could not be both procurator to intimate in the assignee’s name, and also notary to take instruments on the doing thereof †.’

‘ *Passed with us, respectivé et successivé, to the personal presence of the within designed C. and D.*’—This supposes the bond to be granted by two co-obligants ; and therefore the intimation is, with propriety, made to both of them, according to Lord Stair’s directions : ‘ Where there are many *correi debendi* principal or cautioners, intimation made to any will be sufficient as to all ; yet this will not

\* Page 319.

† July 3. 1628, Scott against Drumlendrig.

‘ not exclude payment made by another of the debtors *bona fide*, to  
 ‘ whom no intimation was made. Had. Feb. 23. 1610, Lyon against  
 ‘ Law ; to secure which, it is safest for assignees to intimate to all  
 ‘ the *correi debendi* \*.’

‘ *To the personal presence.*’—Intimation, if possible, should always be made personally, because it puts an end to all subsequent questions about *bona fide* payment by the debtor. When the party cannot be found, the form is, to intimate at his dwelling-house, and to leave a schedule for him, i. e. a brief note, containing the essential parts of the instrument, and the witnesses present at the delivery. This form is taken from the analogy of common executions ; for, since arrestments are competent at dwelling-houses, intimations must be so also ; otherwise the former would have an unreasonable advantage. It is a general rule in all cases, where parties are not found personally, to leave a written notification for them. Indeed, too much care cannot be taken to give complete notice ; for, in the event of the debtor making a *bona fide* payment, his case is very favourable. If, by our ancient law, creditors could not impose another in place of themselves upon the debtors, the change is rather too great, not only to be able to do this, but to subject the debtor to the risk of double payment. From the analogy of executions, intimations were sometimes made at the market-crosses of the head-borough of the sheriffdom where the party dwelt ; but the Lords found [these intimations ineffectual ; and they even doubted how far intimations at dwelling-houses ought to be sustained†.

‘ *Having and holding in his hands the principal bond within narrated, made and granted by them to the within designed E. with the principal assignation thereto.*’—The custody of these writings by the procurator is justly held to be a sufficient power to him ; and, in all cases, he ought to be possessed of the principal bond, as well as the assignation ; for the debtor is then deprived of every pretence of transacting with his original creditor ; he knows with whom

\* Stair's Instit. p. 384.

† July 21. 1632, Hume against Hume.



whom his principal bond is. And, in England, this is the proper security of the assignee; though, with us, the assignment would no doubt be sufficient; and, in case the bond be not at hand, we ought not to wait for it, for expedition in this business is of the last importance.

*'Which bond and assignment the said A. delivered to me, notary public, to be publicly read over and intimated; and which being accordingly done to the said C. and D. personally present.'*—The reading is the essential intimation; the bare exhibiting of the assignment will not do; it must be *verbatim* read, and what is not read is not intimated; for, as is observed in an old decision on this point, a party may intimate his right *pro parte*, and keep it unintimated *pro reliquo* \*. There are conveyances, parts of which only need intimation. The best way, in all cases, is to read over the whole; but, if that be not convenient, an excerpt of a particular part of the writ should be delivered, and the instrument of the intimation should distinctly specify the fact.

*'The said A. procurator foresaid, protested, that the said assignment was duly and legally intimated, and that they might be both liable in payment of the sums of money above assigned, and not pretend ignorance of the said assignment and intimation.'*—The reading, it will be observed, is trusted to the notary public, not to the procurator; because the notary is presumed to be a public and impartial officer, who will read fairly, and conceal no part necessary to be known to the party. The procurator's business is to have the fact ascertained; and therefore he declares the purpose and effect of what the notary has done, by protesting.

Since arrestments came to be allowed in the hands of persons out of the kingdom, there is an absolute necessity for putting assignments on a level with them, otherwise arrestees would have a great advantage, which voluntary assignees had not; but no private party, nor his procurator, has a right to do any thing against a per-

\* Nov. 30. 1622. Murray against Durham.

son out of the country at the time. The market-cross of Edinburgh, pier and shore of Leith, have for a long time been supposed, by a fiction of the law, to be the *communis patria* of Scotchmen, and they are bound to take notice of every thing done at these places in the same way as they must have done had the citation or notice been given them at their own houses, when within the kingdom. But it is only the voice of their Sovereign that people who are absent are obliged to hear ; and therefore, whoever means to act or do any thing at the market-cross, pier and shore, must have a special authority for that purpose, and must act, not by himself, but by a King's messenger, to whom alone warrants of that kind are directed. The form, upon this occasion, is to present a bill or petition to the Supreme Court, reciting the bond and assignment, stating that the debtor in the bond is out of the kingdom ; and therefore praying for letters of supplement for intimating the assignment at the market-cross of Edinburgh, pier and shore of Leith, which are granted of course.

These supplements are now more necessary in our practice than they used to be, from the frequent absence of the people. The procurator for the party sometimes makes the intimation by reading the letters, which is certainly wrong, as the messenger (the person to whom the letters are directed, and whose voice the lieges are only bound to attend to,) is thus rendered a cypher in the business. The following expression is also sometimes to be found in these Supplements : ‘ And protest, that the said complainer having done the utmost in his power to intimate the said assignment, the said A. B. should not pretend ignorance thereof.’ This is an improper clause in the King's letters. The form itself is entirely fictitious. The law alone has prescribed, and given it a determined effect. This expression, therefore, weakens that effect, by acknowledging the absolute insufficiency of the form. This, indeed, gives us a hint that it ought to be supplied ; and, in a number of cases, it has been the practice, when assignments of consequence are intimated upon supplements,



plements, to give separate notice to their factors, relations, or connections, in Scotland ; and, even in the case before noticed, of Laurie against Hay, where the instrument of intimation was set aside, as being too general, notice had been given to the curators and factor of the debtor, and schedules of intimation affixed at the market-crosses. It is also adviseable, in these cases, to write a letter to the debtor, informing him of what has been done ; and, in general, to take every step which may render the edictal citation a real one, by conveying the knowledge of the transaction to the debtor. It is difficult, and sometimes almost impracticable, to intimate an assignment to all the members of a corporation, or of a trading company ; and therefore, in the case of an Hospital, it was found, that an intimation to the treasurer was sufficient \*. Such a narrow intimation is not to be trusted to ; and therefore it is our business to intimate, not only to the treasurer, but to the other officers of the corporation, because they may be easily known, and seldom exceed three or four in number. Where trading companies are concerned, we cannot discover all the members, but the present managers or acting partners may easily be known. Intimation, therefore, may be made to them, or the principal clerks, who have very often procurations from their masters. In a case reported by Lord Tinwald, whose collection is not yet printed, an intimation was sustained made to two clerks of a company, but they were managers by procuration, and a minute had been inserted in the books, which may not always happen to be done †.

Assignments are also effectually intimated, by using diligences in virtue of the assignment, such as charges of horning and arrestments, and also by summonses in the name of the assignee, or by production of the assignment in a process, if depending at the death of the cedent ; but, upon the 14th of March 1626, Laird of Westerhall against Williamson, the Lords found, ‘ That the execution

C c 2

of

\* Kilkerran.—Jan. 10. 1739, Keir against creditors of Lethem.

† Nov. 19. 1755, Watson of Muirhouse against Murdoch.

‘ of an inhibition was not a legal intimation, not being specified, executed, and intimated, to the debtors ; especially that inhibitions had only force against immoveables, and did not strike against the subject contraverted.’ This was a very just and proper determination ; for the publication and registration of inhibitions can reach no further than the law has strictly given them. An assignee, as before observed, may, if he pleases, do diligence or prosecute in the name of the cedent ; but, as the oath of the debtor will be received against an assignee, at any time before intimation ; so, if the cedent’s name continue to be used, every defence will also continue to be probative by the oath of the cedent. Therefore, if it can be avoided, neither process nor diligence should be used in the cedent’s name. If the process depended at the date of the assignment, the production or intimation of it by the assignee makes no difference, because the matter had already become litigious, and therefore the cedent’s oath will continue to be probative \*.

It is not meant here to treat of the equipollents admitted in place of intimation, as that branch is not within our province. It may in general be observed, that regular intimation is chiefly necessary to complete the conveyance, and preserve it from third parties, creditors of the cedent. Therefore assignments are often good against the debtors themselves, though insufficient in questions with third parties.

The practice of England at present differs from ours only in words and form, the remains of the ancient laws from which we have explained the style of this deed. If a debtor shall, after notice of an assignment, pay to his original creditor the assignor, the Court will oblige him to pay the money again to the assignee, notwithstanding of the action being brought in the assignor’s name. If the assignor dies during the action, the mandate falls exactly as it did with us before the act of parliament ; the executor or administrator must lend his name to the assignee ; and, if no person take up the succession,

\* Feb. 12. 1678, Fraser.

*translatio*, which is also the Latin term for *transport*. The word *translation* seems to have been preferred by us, because it was the common term for the removal of a churchman from one charge to another, and had become familiar to our forefathers before they heard of the transport. The style of the translation is an additional and complete proof, that the change in our law with respect to assignments of rights and debts, took place by imitation, and not from any gradual change of manners arising among ourselves. Hence it is that the English appoint another attorney, where we transfer at once. This is the true cause of the difference, which is most remarkable, between the style of our assignment, and our translation. The first is a remainder of the ancient law of our remoter ancestors ; and the other marks the revolution introduced into this branch of that law by our connection with France. The English made the same change in effect, but they have done it by degrees, and preserved a consistency in the form ; whereas we seem to have taken it up at once, without the least attention either to our principles or forms. The consequences of this rashness remain recorded in the style of the writings. An assignee, with us, is still made by a deed in the style and language of a procurator or attorney ; and yet, when the same man comes to transmit the same debt to another, he speaks the language of a full proprietor, and makes a conveyance in plain language, divesting himself of the right, and vesting it in his party. This inconsistency in style, the English have avoided by the constitution of attornies under the first assignee. Our systematic lawyers could not avoid noticing the difference between the form of the assignment and the translation, but do not seem to be able to account for it ; they content themselves with the dry information, that the legal effect is the same. Thus Lord Stair : ‘ An  
‘ assignment doth necessarily require the clear expressing of the ce-  
‘ dent, assignee, and thing assigned ; and, though the ordinary style  
‘ of it be known, yet any terms that may express the transmission  
‘ of the right assigned, from the cedent to the assignee, will be suf-  
‘ ficient ;

\* *efficient* ; as if the cedent assign, transfer, and dispoſe, make over,  
 \* *ſet over*, gift or grant, the thing assigned to the assignee, or nomi-  
 \* *nate* or constitute him his ceſſioner, assignee, donator, or procu-  
 \* *rator*, to his own behoof \*.

This inaccuracy of expreſſion, and declared indifference about legal language, muſt have tended to involve the hiſtory of our law in darkneſs. But his Lordſhip, a learned theorist and philoſopher, ſeems to have paid little attention to the principles and progreſs of our ſtyles. His ſubject obliges him to talk of them, and he does it in this general and uninformative manner ; not ſo the great lawyers in England ; Littleton, Coke, Bacon, in ſhort all of them, have built upon the foundation of writs ; the beſt part of their works are truly commentaries upon deeds. The etymology, the value and legal import of every word, are carefully weighed and determined. The proper application of theſe forms, and the practical knowledge of the conveyancer, furniſh the lawyer with principles and argument. Our lawyers have unhappily taken an oppoſite courſe, and have in a great meaſure neglected the common writs, the forms, and even the records of their native country. In place of the law terms thus given by Lord Stair, and which he ſays are all to the ſame effect ; Lord Coke informs us, that part of them are proper to an assignment of *choſe in action* ; which becauſe of the common law, muſt be assigned by the fiction of a procuratory. That others of them are the language of an *assignment of property*, whereof poſſeſſion may be immediately given, and the tranſmiſſion of which is allowable by the law. Lord Stair, on the contrary, holds out at once, the whole language of tranſmiſſion, as no other than a ſtring of redundant ſynonymous words. His Lordſhip has in fact, put together the ſtyle of our assignment of debts, of our diſpoſitions of moveables, and of our old gifts, as indifcriminate and equivalent terms : But we may reſt aſſured, that our law,

as

as well as that of England, had a choice in the determination of its language ; and that there is very little of it, which had not an original and specific use.

This leads us to say something of the words *donatory*, *give*, and *grant*, which we sometimes find in our old writs of transmissiion. Heirs and donators are just in effect heirs and assigns ; but the word *donator* belonged to a peculiar part of our practice. In the reign of the Stuart family, the property of individuals was so often forfeited to the Crown, by reason of civil rebellion, fines, feudal delinquencies, &c. that had the Crown insisted on its rights, the whole property of the subject would have, by succession, gone through the hands of government. The established practice was, to return these forfeitures in the way of gifts to favourites of the Court, but generally to the relations and creditors of the forfeited persons, or to trustees for their behoof. The second part of Mr Dallas's styles consists of the forms of these gifts, according to the practice of the Scots Exchequer. And the general style is, ' Likeas his Majesty *gives*, ' *grants*, and *dispones* to his lovite.' Our feudal superiors, fond of adopting the practice of the Crown, compounded or sold the escheats and forfeitures of their vassals which fell into their hands, and these deeds of transmissiion they proudly termed *gifts*, although they bore, *in græmio*, a price paid for them. The pretence was, that he the superior had, notwithstanding, acted mercifully, in taking less than the law entitled him to. From this circumstance, he commonly used a mixed style, viz. ' Therefore I *sell*, *give*, *grant*, ' and *dispone* \*.' The receivers were termed *donatories* ; and from our decisions, it appears, that one half of the business of the Court in the two last centuries, was, that of determining the rights and preferences of these donatories, with the creditors and voluntary assignees of the forfeited persons ; so that, without knowing something of the nature

\* The forms of these private gifts may be seen in Carruthers's Styles. St Martin has omitted all private grants out of his system, for what reason cannot be conceived.

nature and consequences of these gifts, we cannot read the records of our Supreme Court with profit or satisfaction. What has been said leaves very little to be observed upon the style of the translation, which runs thus :

‘ *To have assigned and transferred, and by thir presents assigns and transfers.*’—Here the procurator or attorney is doing what his constituent by the style of his right cannot do. The latter is only *constituted* and *appointed* cessioner and assignee ; and yet he, as such, directly *transfers* and *makes over*. Without knowing the history of these deeds, it was no wonder that this appeared unintelligible.

‘ *Together with letters of horning, caption,*’ &c.—It was formerly observed, that our practice directs not only the assignment of the debt itself ; but also of the grounds of it, which we, in imitation of the Romans, consider in a distinct view, as *nomina debitorum* ; and to these we consequently add all the diligences or progressive writs taken out for recovery of the debt itself. Mr Dallas here supposes, that a variety of diligences followed ; and specifically conveys them, which ought always to be done. The law, indeed, holds, that an assignment to a principal deed, carries every thing accessory to it, such as diligences, additional securities, &c. though not expressly assigned. To comprehend these, the general words are extended, and are never forgot : ‘ With all that has followed, or may be competent to follow thereupon.’ Lord Stair takes notice of a case, ‘ where an assignation of a bond was found to carry ‘ a bond of corroboration of the original bond, though not mentioned therein ; albeit the assignation did not bear, with all that ‘ has followed, or is competent to follow thereon ; which is but an ‘ explicatory clause of style of that which *inest de jure* \*.’ In this case, however, the bond of corroboration was produced by the assignee. Our business is not to trust to these opinions, but to convey

VOL. I.

D d

vey

\* Stair.—February 3. 1676, Cully.

vey specifically the whole progressive writs of the debt, and to retain our explicatory clause.

' *With full power to uplift, ask, crave, and receive the sums of money above transferred.*'—This clause is borrowed from the old style of the procuratorial assignment, and has only been added to lengthen the translation. The powers of a procurator acting for another, may be enlarged, limited, or specified, because the radical right remains in the constituent; but a man who *transfers* and *conveys*, and who consequently is divested of the subject, has no right to give any further powers or directions about the management of the matter. Among other things, this second assignee is empowered to use the letters of diligence already raised, either in his own, or in the name of the granter. This is a remainder of the old procuratorial power; by which a person might act either in his own name, or the name of his constituent. Properly speaking, it is inconsistent with the nature of a total *cessio in jure*; and consequently, with the nature of a translation. However, practice has continued it, as a wreck of the ancient form; but it is to be observed, that diligence already raised, can only be executed in the name of the person obtainer of the letters; because a messenger is a ministerial officer of the Crown, who can do nothing but in conformity to the will of the warrant directed to him,—what he ventures to do beyond it, is, *ipso facto*, void and illegal. If, therefore, the assignee chooses to act in his own name, and, it is advisable that he always should do so, he must obtain new letters upon production of his assignment; for the Supreme Court, and not the messenger, is the sole Judge of the propriety of the transmission. This matter came to be particularly considered by the Court, upon the 11th of June 1745, Stewart against Hay\*; when upon a report relative to the practice, from the Society of Writers to the Signet, it was determined, that new diligence must always be raised.

Let us now attend to Mr Spottiswood's definition of the deed we are talking of, which is, indeed, naked and verbal. 'A translation  
tion

\* Falconer's Decisions.

tion (says he) is a continuation of the conveyance of a moveable subject, by the assignee to another person ; and generally, the following conveyances are called translations, though in a fourth or fifth degree of distance from the assignee : others again call such, dispositions ; but there is no settled denomination for such writs ; albeit the style of them be fixed.' It is curious, that there should be no certain denomination for writs that have styles differently fixed ; but this is not surprising, when our lawyers never attended to the reasons and differences of the styles themselves. However, as Spottiswood observes, we have no certain name for any second or third transmission of the right. By our present practice, indeed, every deed after the translation is called a *conveyance* ; which is not an improper change of the term. Spottiswood goes on, ' in the beginning, to the ordinary designation, you put an additional one, thus : assignee after specified, or, as having right by assignation, or translation, or disposition, in manner after mentioned.' There is no necessity for this addition to the designation of the granters of assignments, or other personal rights. It is borrowed from charters and dispositions of heritage, where the relation of disponent to the lands is properly pointed out, by terming him heritable proprietor ; but in personal deeds, where the right of the grantor is immediately to be recited, the anticipation of that title is quite unnecessary.

It now only remains to mention, that all translations and posterior conveyances, require intimation in the same manner, and for the same reasons, as the original assignment ; nor is there any difference in the form, except the addition to be made in the narrative.

It must be here repeated, that Mr Dallas passes over all these writs, without noticing in the least that point of practice, used by many people in assignments and translations, viz. ' turning and transferring the same, and whole right thereto, from me and my forefairs, to and in favours of the said B. and his forefairs.' This is a round flourish of old style, borrowed *verbatim* from the French *transport*, and is of no importance to the deed.



---

---

### *Discharge.*

WHEN a bond is paid to the original creditor, a short discharge is written upon the back of it ; and no person chooses, or can be obliged to pay upon other terms ; for, although the possession of the bond itself might appear to be sufficient, yet it is proper that the debtor should be able to shew that he got it back by fair and honest payment. As consent, proved by a written deed, constitutes a written obligation by the debtor, so it is extinguished by the consent of the creditor, which ought also to be proved by another deed. The one being of equal importance to the other, must be executed with equal solemnity. A maxim in the Roman law came to be universally received : ‘ *Quod chyrographum apud debitorem receptum, praesumitur solutum ;*’ and therefore the method of the church notaries was to cut or cancel the deed after payment of it : Nay, to avoid the ordinary civil law evasions which at that time had become prevalent, debtors were often expressly bound not to prove the payment of their obligations in any other manner but by production thereof cut and cancelled ; and hence we frequently meet with the following clause in the obligations of these times. ‘ *Promittentes nos, non probare solutionem aut liberationem, hujusmodi debiti, nisi per praesentes literas incisas vel cancellatas.*’ Separate discharges, however, were absolutely necessary in partial payments, and in many other cases. Discharges are coeval with obligations. The form and the language of them were almost the same over all Europe.

rope. This deed in France was, and still is, termed *quitance*, of which the notaries made *acquietantia*. Excepting the solemnities in the execution, the ancient discharges would answer every purpose at this moment. Many old Latin discharges are to be met with, proceeding upon exact recitals of the deeds discharged; and, in abundance and variety of expression, far exceeding any style of that kind in our modern practice. Indeed, we may take it for granted that the art of conveyancing was brought to perfection by the churchmen and notaries; and that our more immediate predecessors, the laic writers, into whose hands the whole of the business fell after the Reformation, have only been translating, and too often spoiling, the works of the more able masters, which they found in their hands. When the sums in any obligation were totally paid, then the discharge or *acquietantia* proceeded upon an exact recital of the original writing, just as ours do now; but, when partial payments were made, separate discharges were granted, with abridged recitals, and in a form which does honour to the art\*.

The

\* The following partial discharge, granted by our King James III. to Edward IV. of England, for a part of the dower stipulated with his intended daughter-in-law, may be given as a specimen. The same, or a similar style, was used in all money transactions between Scotland and England, during the 14th and 15th centuries. ‘ Jacobus, Dei gratia, Rex Scotorum, universis et singulis, ad quorum notitias presentes literae venerint, salutem: Sciatis nos, recepisse ab excellentissimo Principe Edwardo, Rege Angliae, nostro consanguineo carissimo, per manus discreti ac magnae prudentiae clerici Magistri Alexandri de Lye, dicti consanguinei carissimi nostri Elimosinarii, in Ecclesia Beati Egidii de Edinburgh, tertio die mensis Februarii; anno Domini millesimo quadringentesimo septuagesimo quinto; summam duorum millium marcarum, bonae et legalis monetae Angliae, in partem solutionis, summae viginti millium marcarum ejusdem monetae, nobis per prefatum nostrum consanguineum carissimum, cum illustri Principe Cicerilia, sua juniore filia, nomine dotis, et causa matrimonii, cum illustri Principe Jacobo, nostro primogenito haerede et filio unico carissimo debitum, prout in indenturis inter nos et dictum consanguineum carissimum inde confectis latius continetur.

De

The old discharge will prepare us for the style given by St Martin two hundred years thereafter. Mr Dallas supposes that the payment of the bond has been obtained by the last holder without compulsion. Where the original bond, or any of its transmissions, has been put into the Register, a separate and formal discharge is evidently requisite, because the debt might at any time be revived upon taking out a second extract. And this is a general rule in our business; for, by this means, the Register becomes an account of debit and credit between individuals. In putting the discharge into the register, it is a convenient and commendable practice to mark the date of the registration of the discharge on the margin of the record of the bond. When bonds have been transmitted by assignments and translations, most people insist to have a separate and regular discharge, in the same manner as if it had been put upon record. The reason given is, that, having passed through several hands, entries may afterwards be found in books; and schedules of intimation, and letters of the parties, may remain in the possession of the assignees, which their heirs might choose to have explained, and perhaps attempt to restore, by a process of proving of the tenor of the original bond; and therefore the safest way is to have a discharge upon record. There is no doubt but this may be insisted for; but then the creditor, unless he pleases, is not obliged to pay for it. Discharges of debts are always drawn by the doer for the debtor. His employer is to pay the money; and therefore his interest is principally concerned in the propriety of the deed. The term *discharge* is from the French *charger, decharger*, to load or unload, charge or discharge. The English use it principally in fines and criminal matters. ‘Discharge (says Jacob) is, where a man, con-  
‘ fined

‘ De qua quidem summa duarum millium marcarum, monetae predictae, fatemur  
‘ nos bene pacatos, contentos et plenarii in pecunia numerata persolutos, et dictum  
‘ excellentissimum Principem, Edwardum Regem Angliae, suosque haeredes et succes-  
‘ sores, ac regnum ejusdem, pro nobis, haeredibus et successoribus nostris, ac regno  
‘ nostro, de eadem summa duarum millium marcarum, quietos clamamus, et in per-  
‘ petuum exoneraamus, per presentes.’—Vide Rymer, Vol. 5. Part 3. p. 58.

'fined by some writ or authority, doth that which by law he is required to do, whereupon he is released or discharged from the matter for which he was confined.' In civil matters, they retain the term *acquittance*, which is the same as our discharge.

We now come to the style given by Mr Dallas.

'*Be it kend, &c. P. G. to whom, and in whose favour, the bond after specified, and sums of money therein contained, are assigned and transferred, in manner after mentioned.*'—This introductory explanation of the party's title is here quite unnecessary. We formerly hinted at the rule in this case, and shall now once for all repeat it. Where the titles of a granter of a deed are specially recited, additions of this kind are evidently useless and redundant; but, where that is not the case, then it is right to add the title to the designation, such as, *heritable proprietor, executor confirmed, apparent heir, &c.*

'*And now seeing A. B. has instantly made payment, &c. whereof I hold me well content, satisfied, and paid.*'—These words, it will be remarked, are the exact translation of the ancient Latin deed, '*Nos bene pacatos, contentos et plenarie persolutos.*' Though this phraseology seems rather superabundant to us, it was composed for a purpose now entirely forgot. The Roman lawyers appear to have been wonderfully fond of new and subtle distinctions, which they multiplied as much as words could express. Thus, they distinguished between actual payment, or the direct performance of an obligation, and the case where the creditor accepts of something else in lieu of it. The form of this last was by an acknowledgment of value received, when in fact it had not been received. This last kind of discharge was termed *acceptilatio*. 'We (says Lord Stair) make more use of the term *satisfaction* than *acceptation*; which satisfaction, if it be upon the grounds equivalent to payment or direct performance, it is equiparate thereto in all points, and has the privilege to liberate, though the obligation be not performed \*.' The church-

church conveyancers, who were often doctors in both the laws civil and canon, in order to guard their discharge against all chances, used the language both of payment and acceptance; and hence the *bene placatos, contentos, et plenarie solutos*, the *well content, satisfied, and fully paid*, of our style. If the granter afterwards denied the payment, the debtor was free by acceptance.

The narrative and cause of granting being past, we now come to the characteristic words of the deed.

‘*Therefore, wit ye me to have exonered, quit claimed, and simplified discharged,*’—This is exactly the *Quietus clamamus, et in perpetuum exoneramus* used by James III. The word *discharge* is the only modern addition.

‘*Quit claim.*’—This is the ancient *quietè clamare*, a feudal term common between lords and their vassals, and between people disputing titles to lands. When a lord had received every thing he could demand from his tenant, he declared or proclaimed him *quit*; and, when one private party gave up his right to another, he gave him a renunciation, or a *quieta clamatio*. ‘*Clamare* (says Skene, in his treatise *De Verborum Significatione*) idem est, quod *dicere, affirmare*; as *clamare* aliquod tenementum, aut aliquam terram esse suam \*.’ The word *quietus* is yet used in the Exchequer for the discharges given to those who receive the King’s money. The church-conveyancers had many other terms of discharge, which they suited to various occasions, and used for the purpose of diversifying their style. They did not always repeat the same verbs in different tenses as we do, but enriched their deeds with a different set. Thus, in the discharge granted by Henry VI. of England to our James I. in the 1424, we find the clause varied in the following manner: ‘*Praefato Jacobo Rege, et ipsius haeredibus et successoribus, occasione praemissa, et de avifamento consilii nostri, pardonaverimus, remiserimus, et relaxaverimus, ac ipsum, suosque haeredes et suc-*  
‘*cessores,*

\* Vide Disclamation.

\* *cessores, pro nobis, haeredibus et successoribus nostris, regibus Angliae futuris in perpetuum, decem millibus marcarum, praedictis acquietaverimus, et exoneraverimus \**.'\*

\* *Foresaid bond, decreet interponed thereto, sums of money,* &c.—It will be observed that the bond itself is here first discharged, then the money, and next the diligence proceeding upon it. This is extremely proper, and perfectly agreeable to the principles of the matter. An assignment, as observed before, is exactly *venditio nominis*, not of the money itself, but of the right to recover the possession of it. A discharge is therefore *liberatio nominis*; for it is not the loan of the money that is recited in it, but the obligation for repayment; and, unless such an obligation or bond had existed in writing, there would be no necessity for a written discharge: And therefore this order should be preserved in all discharges of this kind, i. e. first the bond or written obligation, then the money, and lastly the diligence, which is presumed to have operated the recovery.

\* *All action, pursuit, instance, and execution.*—These words distinguish the effect of the diligence from the letters themselves; which was always done by the old notaries, and serves very well to round this period or clause of the deed; for which reason it continues still to be used. In our Decisions, we find a number of blunders, arising from the careless or negligent use of the general words in discharges of debts. They have given birth to a great number of law-pleas, each of which was, and, as often as they happen again, must be determined by the particular circumstances of the case. The receivers of these discharges always endeavour to extend the general words, and the granter to restrict them; so that an excellent subject of dispute must, in every instance, be afforded. It is not here intended to go into the rules of interpretation of general discharges, either when annexed to deeds, or written separately; we shall only just take notice, that general clauses, and general discharges, are exceedingly

VOL. I.

E e

ceedingly

\* Rym. Vol. IV. Part 4. p. 107.

ceedingly dangerous, between people who have a continued intercourse of transactions. If they do not give ground to disputes during the lives of the parties, the consequence is unavoidable upon their death. In this situation, it is the business of individuals themselves, or their doers, to make every receipt, and every discharge, relate with anxious speciality to the matter to which it belongs. Such is the deed we are now analysing ; the general words are all made relative to the particular debt recited in the discharge.

‘ *And I bind and oblige me, &c. to warrant, acquit, and defend this present discharge to be good, valid, and sufficient, against all hands, and against all deadly, as law will.*’—In most cases, warrandice is a natural consequence of the transaction itself, independent of any particular clause ; but, as the degrees of security given differ with the nature of the business, the clauses of warrandice determine the extent, either of the recourse upon the granter, or of his obligation to the party. When the warrandice is implied, or left to the law, it requires an action upon the fact to bring the party into the field ; but, when bound by a special clause, he can be immediately charged to perform, and obliged to take the business upon himself. The warrandice, both expressed and implied in discharges, always was, and ever must be absolute ; for the person who fairly pays his debt ought certainly to be kept free of all future disturbance. We are not at present to go deeper into the matter of warrandice, because the history and the terms of it fall to be explained when we come to heritable rights. The word *acquit* is from the French *acquiter*. It has two senses in the law ; one, as before noticed, signifieth a discharge in writing of a sum of money, or other duty, which ought to be paid and done. The next, is a clearing from any offence or crime. A man is then said to be acquitted ; and the act of his dismissal is termed *an acquittal*. Lord Coke derives it from the law Latin verb *acquietare*, which imports that the tenant be safely kept ‘ from any entries or molestation from any other lord but his own.’ Hence it is used in warrandice for freeing the subject from any claim or pretensions at the instance of third parties.

parties. Accordingly, we say, in common language, to quit a claim or right, to get quit of any danger or trouble.

This deed may be resolved into the following parts; the narrative,—the cause of granting,—the discharge,—and the warrantice. Spottiswood divides discharges, as he does all other personal deeds, into two classes, simple and compound. There is no difference, but that the last is granted to an assignee, and proceeds upon a recital of the assignment; a few words of difference would make the last compound and the first single; they are both relative deeds. The distinction he makes is altogether groundless.

There is very little difference in the form of the modern discharge, from the old one already considered. In these given by Spottiswood, he erroneously and improperly alters the order, by first discharging the money, and then the bond; whereas in the succeeding form, which he calls a compound discharge, he, after St Martin's method, first discharges the bond, and then the money. This irregularity arises from inattention to the principles of the deed. Both of them in law may be equally effectual; but an intelligent writer, from these marks, will always know, whether a man is directed by a solid knowledge in his profession; or whether he is the servile copiator of any style which accident throws into his hands. In the discharges, Spottiswood supposes horning to have been raised and executed, and he observes, that, upon producing the discharge at the register, the bond may be got up. This is certainly true; but after raising and executing a horning, it is by no means adviseable, especially if the bond happened to be registered in the books of an inferior court; for, in this case, the horning must have been passed upon a bill, and that bill being given into the signet, puts the debt upon a kind of record. Several other reasons might be given, why bonds should not be taken out of the register, after diligence being done upon them. The proper method, is, to record the discharge, and to have the date and registration of it marked upon the register, opposite to the bond itself. It is usually



done, not in the record, but in the minute-book ; because writs are extracted from the principals, which are put up in the order of the minute-book, the record itself being very seldom consulted. The form of a modern discharge of a bond, by an assignee, in Spottiswood's appendix, may be found p. 506. As it is in common practice at present, it is unnecessary to give any other ; and wherever there is any thing published of this kind, I apprehend it to be the properest text to comment upon. Where none such are to be found, then we must supply them. In fact, there is no difference between this discharge, and that of St Martin's, already considered. Only in place of narrating the last transmission, the granter of this modern acquittance, introduces his own title in this manner. ' To which bond and whole diligence above recited, I ' have right by assignation, of date,' &c. This is the general practice at present. It gives some little variety to the uniform narrative of grounds of debt and transmissions. We have simplified the receipt of the money, and generally use the words *exoner* and *discharge*, in place of all the rest. We also seldom or never omit a clause of delivery of the special grounds of debt ; and are careful, upon payment, to leave no vestige with the creditor, of diligence, or any steps taken upon the bond, because it has several times happened, that these being found by the representatives of creditors after their decease, occasioned a great deal of trouble to people who had honestly paid their debts. In case, therefore, any of them happen to be fallen by, they should be excepted in the clause of delivery, and an obligation added to produce them when found. The natural and proper clause of registration in a discharge is for preservation ; but as there is an obligation of warrandice, it generally bears for preservation, and, if requisite, for execution. As the debtor pays the money, and is solely concerned in the validity of the discharge, it is always written by the doer upon his part, and paid by the creditor-receiver of the money. This is a kind of tax upon the person who does diligence ; and, indeed, often prevents it from being rashly and injuriously done.

*Discharge*

---

### *Discharge and Assignment.*

OUR Formalist next supposes, what in practice we find too frequently occurring, that the cautioner has been distressed, and obliged to pay the debt himself. The next deed, then, with which he presents us, is a *discharge and assignation*; which is always demanded by the cautioner upon an occasion of this kind. We have already explained the principles, and the forms of these two deeds, separately; which, in appearance, leaves very little to be said upon them when put together. The subject, however, of relief, to which cautioners are entitled, and the management necessary in making it effectual, form an important branch of our practice. We have already discussed the methods and the deeds, whereby cautioners secure to themselves the power of acting against the debtors for whom they are engaged, and for preventing the demand by the principal creditor upon themselves, by forcing the debtor to make payment in due time. We are now to consider the case, where these methods either have been omitted, or have failed in their effect. The cautioner must now be supposed to have paid the debt himself. In this case, in place of acting upon his bond of relief, he takes a discharge, so far as respects himself, and an assignment to the debt and diligence done upon it, in order to put himself in the place of the creditor, and to entitle him to recover the debt, either in the assignee's name, or his own, in virtue of the diligence already done. It is the benefit of this diligence, which renders the measure often  
necessary;

necessary ; for by being generally prior in time, it has many advantages above such execution as has already followed upon the bond of relief ; and consequently, must be greatly preferable in point of security and effect, to any new steps that can be taken. In the history of this business, the first difficulty occurring, is, the objection which creditors make to grant assignments.

By the Roman law, the cautioner had direct recourse against the debtor, either upon being distressed himself for the debt, or making payment of it. The same recourse was afforded by our law ; and hence our lawyers tell us, that the creditor, upon payment, could not be obliged to grant an assignment, because the law had already provided for the case. A discharge was as good a foundation for an action of relief as a conveyance. And accordingly we find, by the decisions of the Court in the last century, that creditors could not be forced to assign their debts. In a question where compensation was proposed against a debtor who had paid a debt upon a simple discharge, the defender *objected*, ‘ That he produced no assignment to the debt, but only a simple discharge, which could do no more than extinguish the debt, but never could produce an action, or ground of compensation. *Answered* : Some creditors are so scrupulous, they will not grant an assignment, unto which they cannot be forced by law ; but a discharge to a cautioner operates the same effect *quoad* his relief as an assignment would do, except as to the summar discharge and present execution. The Lords repelled the objection in respect of the answer \*.’ In another case, where the cautioner judicially demanded an assignment from the principal creditor, ‘ The Lords found the creditor rigid in refusing an assignment, yet that they could not compel him ; but the cautioner behaved to pursue as accords upon his clause of relief†.’ These decisions only respected the case where the cautioner could qualify

\* Decem. 12. 1695, Wood against Gordon.

† Decem. 31. 1697, Watt’s children against Ponton.

qualify no other interest in the assignment than that of summary diligence, or a more direct and expeditious access against the debtor ; but, if he was able to say that the creditor stood possessed of any separate security for the debt, or that by diligence he had affected any estate, real or personal, of the debtor, he had a direct title to demand a conveyance, upon payment of the debt. The reason was plain : Without it these securities would be entirely lost ; because, unless an assignment be given, they could not be pled upon or used by the cautioner. The Court therefore, at a pretty early period, refused to decern against a cautioner until the creditor assigned the debt, and all the security he had for it from the principal. Thus, in a case reported by Lord Stair, a cautioner suspended, ‘ in respect  
‘ the principal creditor stood possessed of an assignment to a bond in  
‘ security of the debt, which he refused to make over. The charger *answered*, That he was only obliged to give a discharge to the  
‘ cautioner, and not an assignation of the bond itself, *much less any*  
‘ security he had got *ex post facto* therefor. The Lords declared  
‘ they would not give the charger process till he assigned the bond,  
‘ and all security he had therefor, to the cautioner \*.’ And to this decision the practice of the Court has ever since uniformly adhered.

If, indeed, the principal has a separate interest to retain the security, which might be hurt by conveying it, then the law forms an exception in his favour ; ‘ he cannot be obliged to assign to his  
‘ own prejudice.’ So far as to the case where there is but one debtor and one cautioner ; but, where there are two, three, or more cautioners, there, a separate reason arises for insisting on an assignment. Without that, the particular person distressed will be forced into the delay and circuit of a process, before he can reach the other cautioners concerned. Co-cautioners, by the Roman form, were not bound in one deed, as with us, but each of them granted separate

ch. 57

\* Jan. 10. 1665, *Ledley against Gory*.

obligements, and stood thus unconnected one with the other ; or, as the civil law expresses it, ‘ *Nullum negotium gestum est,*’ between them ; so, though one cautioner should be obliged to pay the whole, he had by law no immediate right to recover the proportions from the rest, or, in the law phrase, to obtain relief *pro ratis proportionibus*. Since, then, the law did not afford an immediate action for this purpose, the distressed cautioner applied to the creditor to be put in his place by a cession of the debt, which it was unnecessary to refuse, because he could be obliged to do it by the cautioner’s claiming the *beneficium cedendarum actionum*. The cautioner paying the debt was thereby put in the right of the principal creditor, and entitled to act against the other co-cautioners for his indemnification or proportionable relief. Indeed, this in general seems to have been particularly stipulated. If it was not, the text of the civil law hardly authorises the demand in point of right. Cautioners with us are bound together in one deed. The law, of itself, gives them relief against one another, and, as in the former case, denies them the ‘ *beneficium cedendarum actionum,*’ or the right of obliging the principal creditor to assign his debt. Accordingly, we find, that a Lady, who had several cautioners for her life-rent, refused to assign. One of the cautioners alledged, ‘ That she ought to assign to him, seeing the bond wanted a clause of relief, whereby he will have difficulty to have relief of the other cautioner’s bound. The Lords found that he could not compel the charger to assign, but, in so far as of her own own consent\*.’ But, by a long train of decisions marked in the Dictionary †, it is established, that either co-debtors or co-cautioners have, from the nature of the thing, relief against all others concerned, without an assignment, upon receiving a simple discharge of the debt.

The obligation, then, of a creditor to assign his debt to a distressed cautioner, arises not from the law, but from the equity and propriety

10th July 1666, Hume against Crawford.

† Vide Debitor and Creditor.

priety of the transaction itself. This point afforded an excellent subject for the reasonings of Lord Kaimes. He considers this to be in the creditor an act of benevolence, which the nature of the connection raises into a duty.

According to his Lordship's doctrine also, there is no difference in the legal effect between the real and implied assignment, *i. e.* whether an assignment be actually granted or not, excepting the convenience of ready execution\*. But the practice of the Court informs us, that there is a very material difference; and, therefore, it is our concern thoroughly to understand it. A cautioner paying the debt, can only demand from each of the other cautioners, his proportional share of the debt, after deducing that of the payer. Thus far the Court have gone without an assignment, or upon the implied assignment supposed by Lord Kaimes. The following case from *Harcarse* is in point: 'By a clause of relief in a bond, my

Lord Annandale, Lamberton, and four more, bound therein as 'co-principals to Craigiehall, being obliged to relieve each other 'for their own part, without the taxative word *allenary*; and Lamberton having upon distress paid the debt, pursued my Lord Annandale, to relieve him of half of the debt; alledged for the defender, that he could only be liable for a sixth part, they being 'obliged to relieve *pro rata*.—Answered, The other four *correi debendi* being absolutely bankrupt, the pursuer who paid the whole debt, ought to be relieved of the half by the defender.—The 'Lords, in respect of the notour insolvency of the other four co-principals, decerned the defender to pay the half of the whole debt†.

Now let us see what difference the taking of the assignment makes: 'Lord Bankton tells us, that he who is assigned to the 'principal debt, may seek payment from any one, as the principal

VOL. I.

F f

' creditor

\* Vide Principles of Equity, p. 14, 15, &c.

† February 1683, Lamberton against Earl of Annandale.—Harc. p. 57.

‘ creditor might do. Yet still he must allow his own proportion, ‘ for this he gives as authority, a decision observed by President ‘ Gilmour, No. 124. Kincaid against Lecky \*.’ This is a very plain and considerable advantage ; the cautioner by getting the assignation, is considered in the light of the original creditor, exactly as if he had lent the money ; now by attaching the most responsible of the remaining cautioners, he avoids the danger of the others insolvency, which perhaps might have happened in consequence of his own diligence. Hence we may practically infer : That co-obligants in a bond should not, if possible, allow any one to obtain an assignation to the whole ; they ought upon notice of distress to pay their shares, and take an assignment in the name of a trustee, in order to operate their relief against the principal debtor, or the other co-cautioners who have not paid. These advantages arise entirely from the circumstance of the assignation, and seem to be allowed by the Court to indemnify the distressed cautioner, for suffering in the first instance. But if, before the distress, any of the cautioners have already become insolvent, the taking of the assignation will not entitle the creditor to demand the full debt of the co-cautioners, without deducting his own share of the loss arising from the deficients. Thus one of four cautioners being bankrupt, another paid the debt, took an assignment from the creditor, and pursued a co-cautioner for the three parts, deducting his own fourth. The defender craved allowance for a fourth part of the bankrupt’s proportion, and pled, that ‘ the cautioners were to bear equal burden with one another ; ‘ and if the pursuer did not bear as great a part of the loss by the ‘ insolvency of the *correns* as the defender, there would be an ‘ equality †.’ And in a case of the same kind, about two years afterwards, one co-cautioner sued by another, answered, that he could be only liable for his own share, or *pro rata*. ‘ The Lords found, ‘ That

\* Vol. i. p. 163.

† February 2. 1682, Muir against Chalmers, observed by Hartsarfe, p. 57.

‘ That the pursuer having an assignation, might pursue the defender for the whole, with the deduction of the pursuer’s own share, and of the shares of the nottourly insolvent copartners \*.’

Lord Kaimes declares this effect of the assignation to be unequitable, and he lays down a different plan for our future practice. ‘ To preserve (says his Lordship) a real equality among the cautioners, every one of them, against whom relief is claimed, ought to bear an equal proportion with the assignee. For the sake of perspicuity, let us suppose six cautioners bound in a bond for six hundred pounds; the first paying the debt, is entitled to claim the half from the second, for a plain reason, that the second ought to bear equal burden with the first. When the first and second again attack the third, they have a claim against him, each for a hundred pounds, which resolves in laying the burden of two hundred pounds upon each, and so on, till the whole cautioners be discussed. This method not only preserves equality, but avoids after reckonings in case of insolvency †.’ Lord Kaimes’s method may be very equitable, and very plausible, but it would be found next to impossible in practice, where the cautioners themselves were not willing to contribute in this manner. We are to suppose, that the distressed cautioner gets an assignment, and we have heard that the law allows him, in right of the principal creditor, to attack all or any one of the co-cautioners for payment of the debt, deducing his own share, for with respect to the principal, there is no question. If he attack the whole of them, he runs the risk of hastening an insolvency, which otherwise might not have happened at the time, and a part of the loss would in that situation fall upon himself. On the other hand, there is a chance of some of the parties suspending and giving judicial security. If he attacks only one for the whole, and that one pays upon a discharge and assignation, he gets out of the scrape

F f 2

altogether,

\* March 1684, *Smiton against Kinimond*.—*Harcarse*, p. 58.

† *Principles of Equity*, p. 14.



altogether, though it is supposed, that in the case of an after insolvency, of any other of the cautioners, an action would lie for repetition of his share, which is one of the inconveniencies intended to be avoided by Lord Kaimes's method. No instance of this has occurred, and consequently the point remains undetermined. One thing is plain, *i. e.* that the cautioner in this case touches his money; as to the action of repetition, it will depend much upon the diligence of the party who demands it in discussing the other *correi debendi*. A man's conduct in this business, therefore, is to be directed by prudence, and the particular circumstances of every case. We shall now consider St Martin's form of the discharge and affignation.

' *And now seeing the said C. D. as distressed cautioner has made payment,* ' &c.—The distress appears from the narrative of the diligence against him, which is supposed to be against the cautioner in this deed. The purpose of this expression is to intimate, that it is only in consequence of diligence, that the cautioner has paid; for a cautioner who pays upon distress, has a variety of privileges, which those who pay without distress have not. In the first place, by the act of sederunt 1st February 1610, the Lords declared, ' That after ' the cautioner is distressed and compelled to pay, they will in time ' coming grant action to the cautioner, not only for recovery of the ' sums contained in the contract, but also to oblige the principal ' debtor to pay annualrent of all the sums exacted from the cautioner, in consequence of the distress.' This is now an established rule, and has been adhered to in every case, where the demand happened to be made. Where this accumulation of annualrents is an object, it must be noticed, that it cannot be recovered in consequence of the affignation, because the cautioner there acts in right of the principal creditor. Where the cautioner has paid up any considerable sum in annualrents and expences, and has been kept long in advance, it is his interest to seek relief, rather by way of action than by diligence upon the assignment. The second advantage

tage to a distressed cautioner, is, that if he has given due notice of the distress, there can no objection lie against his relief, whereas, if he pays without distress, and without intimation, it is on his own peril; for if the principal had a good defence against the debt, he is not bound to relieve the cautioner, who thus rashly advances it\*. The next thing is, that a cautioner paying upon distress, retains his relief against his co-cautioners for forty years, notwithstanding of the act 1695, which declares them to be free in seven. In the Dictionary†, there is a decision marked in these words: ‘It was found, That action against the cautioner for relief, is not cut off by the septennial prescription; but runs the course of 40 years, February 1726,—Forbes against Dunbar.’ Where the cautioner pays upon distress, there can be little doubt that the principle of this decision is right; but when he pays without distress, it is apprehended, the case would be reversed, the cautioner would be held in the same light as a stranger, choosing to lay out his money upon that security; and of consequence the co-cautioner would be free. For all these reasons, therefore, it may be inferred, that cautioners ought never in general cases to pay, but, upon distress; and that the discharge and assignation ought always to mention that circumstance.

‘*Has made payment to me of the said sum, annualrents, and expences, &c.*—In deeds of this kind, it is always proper to specify the precise sum paid, in place of such a general receipt. The use of it is twofold; first, because it presents at once an accumulate sum, which is to bear interest against the debtor and other cautioners proportionally from that date; and, secondly, it removes all questions about the quantum of the sum paid; otherwise it may be alleged, that the cautioner has transacted the debt, and that he has got an ease or deduction at the payment. Now it has several times been found, that such eases must be communicated to all concerned, excepting it appears, that the principal creditor intended a personal compliment

\* Durie, 19th December 1632.—Maxwell.

† Vol. ii. p. 116.

compliment or donation to the cautioner. Two things are supposed to point out these kind of transactions. The receipt in the deed is usually in general terms, and the debt itself is sometimes not assigned to the cautioner, but to a trustee for his behoof. This matter is argued by Lord Kaimes, who concludes thus: ‘ Upon the whole, my notion is, that if a cautioner in the view of objections against the debt, or in the view of any circumstance which regards the principal debtor, obtain an ease, he is bound to communicate that ease to his fellow cautioner, upon the following rational construction, that he acted for the common behoof. This clearly enough appears to be the *ratio decidendi* in the case reported by Stair, July 27. Brodie against Keith. But if upon prompt payment by one cautioner, after the failure of others, or upon any consideration personal to the cautioner, an ease be given, equity, I think, obliges not the cautioner to communicate the benefit to his fellow cautioners. And this was decreed, Stair, July 8. 1664, Nisbet against Leslie\*.’ Where the deduction is personal to the cautioner, the best method is, to mention the fact truly and distinctly in the assignment. If it arises from the nature of the transaction, the same thing should be done, with the direct view of communicating it to all concerned.

The deed under our view is complex, consisting of a discharge and an assignment; and the discharge which is in the usual style, with great propriety comes first in order. A discharge was necessary upon this occasion, in order that the distressed cautioner might be relaxed from the horn; which otherwise might have proved exceedingly inconvenient. Accordingly, it will be observed, there is an express consent for the purpose. The cautioner presented a suspension, together with the discharge, which passed of course, and had the effect to remove the process of horning, in consequence of a warrant for relaxation, contained in the letters of suspension, which will

\* Principles of Equity, p. 25.

will afterwards come to be considered. A discharge was also at that time, and still is, equally necessary to extinguish the debt, in the person of the principal creditor. It takes effect from the moment of delivery, and, therefore, cannot be hurt by any posterior deed; and, especially, when proceeding upon distress. This should be done, even in the case where a discharge only has been granted, without an assignation. The reason is, that a discharge in this case is held in law to be an assignation, so far as respects the indemnification of the party discharged against all concerned. To avoid all mistakes, however, real or pretended, between the principal creditor, and others concerned, it is the cautioners business immediately to notify his assignment, either by instrument or diligence.

‘*Discharges the said C. foresaid, his heirs, &c. of his said caution-ry, and of all action competent against him.*’—This discharge it will be remarked, is limited to the individual and his heirs; for, if a creditor pleases, he may discharge any one or more of the cautioners, upon allowance of their share to the rest. In the same manner he may discharge any diligence or security belonging to any one of the cautioners; but if he does so he must give allowance to the amount; because the other-cautioners concerned have right to an assignation to that security. Thus a principal creditor having consented to the relaxation of a joint obligant in a bond, and having thereby lost the gift of his escheat, the other obligant contended for allowance of half of the debt. ‘The Lords found the charger liable to make up the damage sustained by the suspender, by consenting to relax the cautioner\*.’ The cautioner then being discharged of his personal obligation, the debt is immediately vested in him by assignment for recovery.

‘*But also for the said C. D. his better relief,*’ &c.—This is a second induction or cause of granting, applicable to the assignment, and is extremely proper. In St Martin’s time, there could be no doubt:

\* January 25. 1717 —Wallace against Lord Elbank.

doubt about the character of the cautioner, because the bond itself always expressed it; but since bonds of relief have been taken a part, it is necessary for the creditor to see that bond of relief before he grants assignation, and to recite it in the deed, which is accordingly now always done; nay, it is not uncommon for the principal creditors to take the word of the person that pays them, in which case the fact is mentioned, and the discharge restricted to the legal right or title, which the obligant paying, may have to relief.

‘*But any prejudice or derogation to the clause of relief contained in the said bond, or any relief apart,*’ &c.—It is a general rule in our business, that wherever any new obligation is granted, security added, or deed executed in favour of a creditor, care is always taken to express, that these new or additional acts are not to prejudice or innovate the former securities. These clauses are intended to avoid the Roman doctrine of novation, whereby a creditor accepting of a new obligation for a debt, the former security was understood to be discharged.

‘*Assign, transfer and dispoise in favours of the said C. D. the foregoing said bond.*’—It will here be observed, that the proper style of the assignation is dropt. In place of *making* and *constituting*, the assignee directly *assigns* and *transfers* the bond; and this is now the universal usage in drawing complex deeds, the old style being confined to the simple assignment. It is not, however, the money which is first in order, it is the bond and decret and then the money contained in them; and this ought to be their constant order in translations or conveyance of debts.

‘*In so far allennarly, as concerns and may be extended to, and as the same may militate against the said A. B. principal party, and his representatives; and as execution may be had and used against them therefore, and no further.*’—This restriction is intended to avoid the possibility of any after question upon the nature of the warrandice

warrandice in the assignment, to throw the dispute about the extent of the relief competent to the cautioner, entirely between him and his principal ; also to prevent any use being made of the assignation against the party discharged, and his heirs. The discharge is warranted from all hands ; and the assignment from fact and deed. St Martin makes the one follow the discharge, and the other the assignment, which is a very proper and distinct method. They are generally, by the present forms, put together. About the beginning of this century, some writers, besides the restriction above-mentioned, inserted, from an excessive degree of verbal caution, a *salvo* against the double warrandice deducible from the discharge and assignment. In this, they were slaves to the phrase *double warrandic*, which could never be incurred by two deeds quite rational, and compatible with each other. Such declarations are now totally out of use.

We dismiss the discharge and assignation, with this single remark, that though the assignation can in few or no cases be now refused, yet some people take advantage of the law in the matter of payments : They will grant a discharge and pay for it, but if you want an assignation, you must pay it yourself. The difference in the expence is small ; and, therefore, when business is done in an amicable manner, this subtlety is never made use of. When personal differences subsist, parties are too apt to take the advantage.

---

## *History of Personal Diligence.*

**W**E are now to suppose with our text-book, That, in place of paying the debt contained in the bond and decree of registration, the debtor either from inability, or want of inclination, refuses or delays to make payment ; and that the creditor is obliged to have recourse to those methods which the law provides for enforcing compliance with its decrees.

The writs sued out in England to compel obedience to the law, are termed *writs of execution* ; in Scotland they go under the name of *diligences*. ‘ They are called diligences (says Lord Stair) because they excuse the users thereof from negligence ; whereby posterior diligences being exactly followed, are preferable to prior diligences being neglected, *vigilantibus non dormientibus jura subveniant* ; they are also called diligences, because, though the effect do not follow, yet the user thereof hath endeavoured what he could ; and so is held as in the same case, as if he had obtained the command of the precepts or decreets. These precepts or decreets are called executorials before execution be thereupon ; but they are only called diligences when they are executed in due time. The diligence in executorials, after decret (continues he) are horning, caption, poinding, &c\*.’ This etymology is no other than an ingenious conjecture of Lord Stair, founded upon the common

\* Stair, p. 705.

common acceptation of the word *diligence*. That word is purely French, and is the ordinary practical term synonymous to the word *pursuit*. Sometimes it means the process itself, and at other times the execution. In the other sense, they say that a cautioner is not liable till diligence be done against the principal, which is our own precise practical language. Lord Stair's distinction between diligence and executorial is purely from the French practice, and coincides exactly with our own. When letters are issued by the King, or the Sovereign Courts, for compelling obedience in civil business, they were, and still are termed, *lettres executoires*; when executed, they become *diligences*. Thus, by the 86th article of the Customs of Normandy, it is provided, that adjudgers shall remain possessed of the original diligences of their decreet, which is also our practice, even in that very branch of business. Our letters and precepts before execution, are also termed executorial; hence the language of our clauses of registration: 'That letters of horning, or other executorial necessary, may pass hereon.' It is only after execution, that, properly speaking, they become diligences; in which term is included the execution or indorsements themselves. In general, however, the King's letters are termed diligences even before execution. The practical phrase is to *raise* such and such letters, or, according to our older style, to *purchase* them. These last modes of expression are also directly from the French practice; they say *lever lettres*, i. e. to relieve them by payment of the fees at the office. In this sense, the English understand the matter at this moment. 'When a person (says Judge Blackstone) wants redress from the law, he is to make application or suit to the Crown, the fountain of all justice, for that particular remedy he is determined to pursue; he is to sue out or purchase, by paying the stated fees, an original writ from the Court of Chancery, which is the *officina justitiæ*, the shop or mint of justice, wherein all the King's writs are framed.'



Another term used in this branch of practice, is that of *exped-*  
*ing* letters. There is no such English word. We had it from the French verb *expedier*, which signifies the making out the principal copies of letters, judgments, and other juridical writs. It is also a term in the Roman Chancery, where bulls and other writs prepared by the writers, are called *espedizioni*. Accordingly, by expediting letters, we mean writing out the principals, procuring them to be signeted, sealed, and completed. When a charter has to pass through the seals, we call it passing the charter, formerly, the term was to expedite it.

The common terms of the business being thus explained we go on to our text book.

The next thing to be considered, is, 'What if the debtors will not pay without legal compulsion; in which case the creditor may use personal or real execution, or both, in his option; and, because personal execution is for the most part used, I shall discuss it first; and so concluding both debtor and creditor to be in life, (if otherwise, the case would alter, as afterwards appears) the bond would be registrat, and if not assigned, horning may be raised thereon\*.'

If the ground of the decree consisted in the performance of any fact, then the essence of the horning is a warrant commanding the party to perform his obligation under the pain of being denounced rebel to the King; and this denunciation becomes the warrant for issuing a writ of caption to compel obedience by imprisonment of the person, for no other kind of diligence is competent *ad facta praeſtandu*, or forcing performance of illiquid obligations. But if, as in the present case, the decree be given for a precise and liquid sum of money, then the letters issued, besides the warrant of denunciation, which is, properly speaking, the horning, contains a separate warrant for poinding such moveable effects as are in the debtor's possession,

\* Dallas's Styles, p. 8.

possession ; and arresting those belonging to him, which are in the possession of other people. It is then called *horning and poinding* ; and is the warrant or first step of complete personal execution, by which we are always to understand, execution against the person and moveables of the debtor.

If the bond has been registered in the books of Session, the decree of registration contained in the extract is, properly speaking, a decree of the supreme court ; the extract therefore is *per se* a warrant for issuing the horning. The letters of horning bear to be given of the same date with the date of registration or extract. It is the business of the officer who attends the signet under the deputy-keeper to examine the validity of the extract, and also whether it agrees with the date of the horning. If, on the other hand, the bond has been recorded in the books of any inferior judicature, such as a sheriff, commissary, or magistrates of a royal borough, then the precept of the judge must either be previously executed, by charging the debtor to make payment within the days mentioned in the decree of registration ; or, if no days be mentioned, within fifteen after the date thereof. After elapsing of the charge, or at least after elapsing of the same number of days from the date of the registration, in case no charge has been given upon the precept of the inferior judge, which is now very often omitted, a bill must be presented to the Lords of Session, praying their Lordships to grant warrant for letters of horning in terms of the decree of the inferior judge. The reason of this is, that sheriffs and other inferior judges (the magistrates of royal boroughs excepted) have no power to grant diligence against the person of the debtor ; they can only authorise the poinding and arresting of his moveables within their own particular jurisdictions. The supreme court neither will nor can extend the powers of other judges beyond their determined limits ; but, having the direction of the King's letters, they issue them in his name, agreeable to the decree of the inferior judge, the execution of which is thereby rendered universal over the kingdom. The letters of the Supreme Court

are

are in aid of the inferior judicatures ; and the precepts of the latter were anciently termed *letters conform*. They were granted by the Court of Session, upon a second summons, requiring the parties to hear and see them granted, or to show a reasonable cause on the contrary, the sentence pronounced upon that occasion was called a *decreet conform*. These decreets conform gave place in course of time to the present shorter mode of bills or petitions ; for, in the old law language of the whole island, all petitions were termed bills. This bill or petition is given in to the clerk of the bills, who is one of the clerks of court entrusted with this department. It is his province to examine the validity of the warrant, and to consider whether it be a legal foundation entitling the complainer (for so the party who makes the application is termed) to have letters of horning, or other letters which he craves. The expiration of the charge, and disobedience of the command of the sheriff, is the essential circumstance which founds the letters of horning ; and if this is neglected, which sometimes happens, it would formerly have been an essential nullity in the new letters. What the court might at present determine, it is not my province to conjecture. If the clerk to the bills finds the warrant sufficient to authorise the prayer of the bill, he writes the date of presentment upon the back of it, and then says, ‘ *Fiat ut petitur* ; because the Lords have seen the precept within mentioned.’ He also writes his name towards the foot of the bill, as an attestation that it is examined ; for, without this, the Lord Ordinary upon the bills, to whom it is immediately thereafter presented, will not, or at least ought not, to sign it. This attestation makes the clerk answerable for its propriety. It is the warrant upon which the Lord Ordinary upon the bills signs the interlocutor. The registered bonds, or, as we term them, the proper warrants of the bills, are not produced to the Lord Ordinary.

Till within these very few years, the year and month upon the back of the bills were not marked with common Arabic figures, but with the ancient numeral letters used by the Roman chancery in the dates  
of

of bulls, and other ecclesiastical writs issued by the Court of Rome. The month was also marked in Latin. As to us moderns, the hand-writing of the clerk to the bills rendered these dates complete secrets; at any distance of time they could not be decyphered by themselves, or the keepers of the signet. The present clerks to the bills have very sensibly parted with this hieroglyphic, by writing their dates in the common and intelligible manner. The former method was a curious relic of antiquity. The terms of granting the petition are no less so; *fiat ut petitur*. Our Lords of Session, upon no other occasion, assume a stile of such superlative grandeur. This exalted phrase in fact belonged originally to his Holiness the Pope. It is a circumstance of no small curiosity, that every *item* of this very common form of ours has been taken from the practice of the Roman chancery by the first judges of our courts, who were originally ecclesiastics, and who were no doubt proud to copy their procedure from the first model in the world. When a request was presented to the Pope, praying him for some benefice, favour, or indulgence, it was put into the hands of an officer called the *dattary*, who, like our clerk to the bills, instantly marked upon it his name and the day of presentment in majuscule letters, so termed from their superior size. If the request regarded an inferior piece of business, it was granted by the presenter of the signatures in these words: 'Concessum est ut petitur, in praesentia Domini nostri Papae;' but if the matter was of high importance, his Holiness granted it in person by, *fiat ut petitur*. This was written with his own hand; with the addition of the initial letter of the name under which he went before he was raised to the chair, and the writing was termed the *signature*. Thence the petition itself so granted came universally to be called a signature, a title well known in another branch of our practice. The date of the presentment also continues to be the date of the signature, and not the real date of the subscription; which is precisely the case at this moment with many of our  
common

common bills \*. The English ecclesiastics, in some degree, borrowed the same stile. *Fiat execut. istius breve* is an ancient phrase in granting the desire of writs.

If there is any thing particular in the bill, or out of the usual form; it is the duty of the writer to the signet, presenter of it, to point out the speciality to the clerk, who states it to the Lord Ordinary; and, if he finds any difficulty, he reports to the court. If they get over the difficulty, the bill passes upon report; and the interlocutor bears: 'The Lord Ordinary having advised with the Lords, passes this bill.' When this is done, the letters are made out, and the date of the bill, like the Roman signature, must be the date of the letters.

It was mentioned, that, when a bond is registered in the books of Session, or a decree given by that court, there is no occasion for a bill; but, as the date of the decree must be the date of the letters, it is evident, that, if the decree is allowed to lie over above a year, then the date of the signeting varies too far from the date of the letters, and from the year of the King's reign. The officers at the signet, however, make no scruple about this; they signet a horning of a date ten or twenty years back, though in the reign of another King. This is a very slovenly practice; and, as little care is taken to mark the real year of the reign, egregious blunders are frequent in that circumstance, and would go far to annul the diligence, if observed and objected to. Before the jurisdiction act, at least when escheats fell upon hornings, writers were more attentive in this particular. When a decree of the Court of Session lay over more than one year, they passed bills upon them; and then the date of the bill gave a proper date to the letters. It is, at any rate, an advantage in every case to pass hornings upon bills. The bills became a record, from which the letters can at any after period be extracted; whereas diligences upon decreets of the Court of Session cannot be supplied when lost; and there are several instances where debts have been lost upon that account.

When

\* Vide Castillo upon the forms and usages of the Court of Rome, vol. 1. p. 10.

When the letters are signeted, they are put into the hands of a messenger, who charges the debtor to make payment in the precise terms of the will of the letters. The space of charge being expired, the debtors goods are poulded or arrested; but, if his person is meant to be taken in execution, he is denounced rebel by the messenger, under a proclamation said to be made by three blasts of a horn. Of old, this ceremony was literally performed at the market cross of the boroughs or sheriffdoms where the debtor dwelt. It is now a mere form, passed over in silence. The messengers, however, return executions, bearing all the ceremonies to have been distinctly performed. Within fifteen days after denunciation, the horning and execution thereof must be registered in a particular register for hornings and inhibitions kept for each county, or in the general register kept at Edinburgh for the whole kingdom. The keepers of these registers give certificates of the registration upon the horning itself. The debtor is by these forms made guilty of rebellion; and the horning so prepared becomes a warrant for issuing letters of caption for apprehending and imprisoning him as a rebel to the king.

Every step of this process must be to a student of the law matter of alternate wonder and disgust: We find debtors for civil debts imprisoned, not properly for failure in payment; but for rebellion to their sovereign. If magistrates and judges do not enforce this unreasonable punishment, they too are very soon involved in the same rebellion, and thrown into prison. In short, to whatever part of the law of Scotland we turn, still we find the process and the penalty the same; without the least respect to the possibility of the thing, or any inquiry whether the failure of the party was occasioned from obstinacy or want of ability. We find rebellion and its dreadful consequences to be the capital execution of the laws of this country. Looking backwards, we are amazed to see actual treason against the state, and the innocent refusal to pay a debt, put almost upon an equal footing; the same writs, the same process, the same

forms, and the same punishment, being common to both. The account given by our lawyers of this astonishing peculiarity in the laws or practice of their country, gives little or no satisfaction. Lord Kaimes alone, struck upon the proper method of explaining this mystery. What his Lordship supplied by conjecture, we have endeavoured to fill up from authority ; and by our carrying our inquiries nearer to the real source, we shall attempt to developé this curious and interesting branch of our personal diligence ; and to deduce the circumstances of the modern practice, from the primitive manners, and positive institutions of our ancestors. The former is certainly perfectly unintelligible, without an acquaintance with the latter. In endeavouring to do this, we shall be obliged to speak of a variety of laws and of forms, which are now little known or attended to. As they are closely connected with the progress of manners and of society, they will not prove altogether unintertaining ; nothing, however, is to be introduced, but what is thought necessary for conveying a proper knowledge of the forms we are daily putting upon paper, with the reasons and fundamental grounds of the several modes of execution, which at this moment continue to follow upon them.

However strict the prohibition of the Scripture might be against the oppression of debtors, by usurious devices and demands ; certain it is, that, among the Jews, creditors had not only the power of imprisoning their debtors, but of making slaves of their persons, and selling their wives and children. By the ancient Roman law, the condition of the debtor was still more terrible, and, like the people themselves, inhuman and barbarous. The laws of the Twelve Tables allowed creditors the shocking power of tearing their debtor to pieces, and dividing among themselves the members of his body. The same law put it in the option of the creditors, to sell their debtors as slaves to foreigners, and apply the price received for them in payment of the debt. Barbarity itself hesitated to make use of the detestible privilege first mentioned ; yet was the condition of the debtor,

debtor, for a long period of years, rendered extremely miserable; and thence arose the dangerous insurrections which so often threatened the existence of the state, in the first ages of the republic. Though there had been but a single creditor, he might have sold his debtor, or employed him in labour, or treated him in any manner he pleased. A citizen reduced to the condition of a slave, for payment of his debt, was termed *nexus*.—So Varro says, ‘*Liber qui sua opera in servitute pro pecunia quam debet, dum solveret, dat, nexus vocatur.*’ At other times, they were termed *homines addicti*. Their condition was so much the more deplorable, that they got no credit for their labours or their sufferings,—their debts were not thereby diminished. This severity of the law, and unhuman usage, continued down to the year of Rome 429, during which period, it occasioned a number of dangerous insurrections.—The law even went the length of obliging children to surrender their liberty, and become slaves for payment of their father’s debts. At last, a law was passed, importing that the effects of debtors should thenceforth alone be answerable or saleable for their debts; and that their persons should not be enslaved, ‘*Pecuniae creditae*’ (says Livy) *bona debitoris non corpus obnoxia essent, ita nexi soluti, cautumque in posterum ne necerentur.* Creditors, however, were still allowed to confine the bodies of their debtors in prisons belonging to the public; until Julius Caesar, commiserating the condition of unhappy men in this situation, procured them the benefit of *cessio bonorum*, i. e. the benefit of surrendering their whole effects in favours of the creditors, which was upon that account termed the *lamentabile remedium*.

The Gauls and Germans, when unable to pay their debts, and even those incurred by gaming, sold themselves as slaves to their creditors and great men, who had the same right over them, that the Romans had to the *addicti homines*. The learned Seldon, says, that among our ancestors, ‘*vinculis coercere rarum erat,*’ but from the remains of the Saxon laws, it is certain, that creditors had the



power of seizing the properties of their debtors,—of imprisoning their persons,—and of holding them in slavery till satisfaction was received. The feudal ideas and laws of the continent, established themselves in Britain, after the Norman Conquest. The connection and duties owing by the vassal to the superior, and the safety of the kingdom at large, depending upon the preservation of that connection, produced a considerable alteration. Imprisonment of one man at the instance of another, merely for payment of a debt, was looked upon as inconsistent with justice to the superior, who had a higher interest in the person of the vassal, than could arise upon a debt or claim to any third person. The King was the universal Lord of the whole nation, to whom all other subjects owed obedience. So soon, therefore, as the courts and judges instituted by him, drew to themselves the business of the nation, all were bound to pay obedience to their orders and to obey their decrees. The jurisdictions which they exercised, were bestowed upon them by immediate warrants from the King; and thus acting by royal commission, disobedience to them was held to be disobedience to the Prince, and punished accordingly. Actions before the courts were brought by original writs, called *brevies*; whereby the defendant was commanded to do what was required, or to give a reason why it ought not to be done. The pursuer stood bound to give security that he would prosecute the action, and the defendant was obliged to give security for his appearance, and for defending himself. If he did not appear, an order was issued to the sheriff to distress him, by seizing so much of his effects from time to time. If he had no effects, a writ was issued for seizing his body, and committing it to prison, called a *capias ad respondendum*. If the debtor disobeyed, and absconded from the pursuit of the sheriff, then, in the case of crimes, the court, in support of their own dignity, proceeded to declare him an outlaw, and to forfeit his property as a rebel. In process of time, the same mode of compulsion, partly by custom, and partly by statute, began to be  
extended

extended to a great number of common actions, and particularly to actions for common debts\*.

This severe mode of legal compulsion is in daily use in England at this moment ; such an outlawry, as Judge Blackstone tells us, is putting a man out of the protection of the law, so that he is incapable to bring any action for redress of injuries ; and all his goods and chattles are forfeited to the King. A reversal may be had, by the defendant appearing personally in Court, and pleading any objection, it being considered only as a process to compel appearance. The defendant, however, has to pay the costs, and put the plaintiff in the same condition as if he had appeared before the writ was awarded. ‘ If the defendant did not appear, then (says Judge Blackstone) he was gradually stripped of all his substance by repeated distresses, till he rendered obedience to the King’s writ. In cases of injury, however, accompanied with force, the law to punish such breach of peace, and prevent such disturbance for the future, provided also a process against the defender’s person, in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached, subjecting his body to imprisonment by the writ of ‘ *capias ad respondendum*.’ This writ made sure of the respondent’s bodily appearance ; and, therefore, in order to obtain it for civil debts, a fiction of law was practised. In place of taking out the writ for a debt, it charged the defendant with a pretended breach of the peace, in breaking through the inclosures of the plaintiff, *vi et armis*. This charge being of a criminal nature, justified the *capias* against the person of the defendant ; and being thus secured and forced to give bail, the Court, conscious of the purpose of the device, allowed the real action intended, to be insisted in. In short, the whole English process, in a case of this kind, is a train of fictions,

\* Vide Blackstone and Sullivan, as to the process and the effect of the English outlawry.

tions, merely to get the better of the principle of the ancient common law, which denied personal execution at the instance of one subject against another, for a debt merely civil. Judge Blackstone apologises for them by saying, ' That they are beneficial to all parties readily acquiesced in, being illustrations of that maxim of law, that *in fictione juris consistata equitas.*' Thus, during the dependence of a civil debt in England, the defendant must either be actually a prisoner, or a prisoner out upon bail. If he never made appearance of any kind, he is rendered an outlaw, by the process formerly described, and his effects forfeited to the King.

The compulsitors hitherto mentioned, are all intended to bring the defender into Court, in order that the suit may be proceeded in and determined, and to ensure obedience to the decree there given. We are now to take notice of the execution, which issues upon the decree when given in order to enforce obedience. By the old maxim of the common law, no other execution could go out after the decree had been awarded, than had formerly issued to enforce the appearance of the debtor in the process itself. At that period, lands were not open to attachment for debt, and the debtor's person was safe by the law; nothing, therefore, remained to be taken in execution but the moveables; so that, if these were insufficient, the creditor had no benefit by gaining his plea. When damages, however, were given for crimes or injuries, these were considered as a punishment which it behoved the debtor to suffer. And so when debtors came by the fiction of the law to be charged with a pretended injury or breach of the peace, in the case of actions for debt, or in the cases where personal execution was awarded by particular statutes, then execution was issued by attachment of the person, as well as the property of the debtor, against whom a judgment of Court had been given. Sir William Blackstone informs us: ' That the first of these species of executions is by writ of *capias ad satisfaciendum* ;

' which

\* Vol. iii. p. 283.

‘ which distinguishes it from the former *capias ad respondendum*,  
 ‘ which lies to compel an appearance at the beginning of a suit.  
 ‘ And, properly speaking, this cannot be sued out against any, but  
 ‘ such as were liable to be taken upon the former *capias*. The in-  
 ‘ tent of it is, to imprison the body of the debtor, till satisfaction be  
 ‘ made for the debt, costs, and damages\*.’ The writ of *capias ad*  
*satisfaciendum*, is an execution of the highest nature, in as much as  
 it deprives a man of his liberty, till he makes the satisfaction award-  
 ed; and, therefore, when a man is once taken in execution upon  
 this writ, no other process can be sued out against his lands or  
 goods.

Such is the history of execution against the persons of debtors in  
 England. Our ancient law agrees with it almost in every particu-  
 lar; to be satisfied of this, no more is necessary than to read the  
 first chapter of our ancient book, termed *Quoniam attachiamenta*, or  
 the Baron’s laws. This chapter respects the process itself, and the  
 writs necessary to force the appearance upon the part of the de-  
 fender. The attachment upon the goods and gear there mentioned,  
 answers to the English *distingas*, which was competent in pleas of  
 debt, convention, or moveable goods. Arrestment, we find, could  
 not be made upon the body of a man, but in pleas of transgression  
 or crimes. This last writ then, is the same as the English *capias ad*  
*respondendum*. ‘ Attachment (says Skene) in his notes upon the  
 ‘ Latin copy, is a Gallic word for a kind of personal citation, for  
 ‘ *attacher* is to bind, to tie; and, therefore, attachment is a tie by  
 ‘ which we are cited to justice; obliged, or as it were bound to ap-  
 ‘ pear in judgment.—*Wrong* is an injury; an *unlaw* means some-  
 ‘ thing without or against the law; these are pursued by *sicker*  
 ‘ *burgh*, i. e. by secure pledges or cautioners.’ With regard to the  
 execution, our old law is equally consonant to that of England†.

In.

\* Blackstone, Vol. iii. p. 414.

† Vide *Quoniam Attachiamenta*, chap. vii.

In these laws, we find no trace of the fictions which were afterwards devised in England, to deceive the common law ; by stretching the execution competent only in real injuries, or criminal matters, to cases of civil debt. On the contrary, from the 39. cap. of the Quon. Attach. we learn, That a freeman should not be imprisoned upon a complaint of another, ' swa that he find sufficient ' pledges to answer as law will to the party complaining upon him, ' excepting in the crimes therein mentioned, in which bail cannot ' be received.' By the laws too of Robert, William, and Alexander, we find a specification of public crimes, for which the persons guilty were subject to incarceration ; but none of them respects civil debts, excepting one of Robert I. which will afterwards be noticed.

It is here necessary to stop, and to introduce to your acquaintance another jurisdiction, from which an execution arose against the persons of debtors, more universal, and more severe than any thing yet mentioned. In a former treatise, we had occasion to take some notice of it, but it will now be necessary to be more particular ; because, without a more special information than has hitherto been given, it is impossible to understand our own acts of Parliament ; or to connect the history of personal execution with the letters of horning and other writs, which continue in daily practice. The jurisdiction we mean is that of the Ecclesiastics, which is founded upon the words of our Saviour : ' If your brother has offended ' you, reprove him by himself ; if he will not hear you, call two ' or three witnesses ; if he will not hear them, complain to the ' church ; and if he will not hear the church, let him be as a sinner ' and as a heathen.' The Apostles discharged Christians to carry their differences before the Magistrates of the Gentiles ; and ordered them to chuse arbitrators among themselves. Christian Emperors extended this power, and the church herself was peculiarly attentive to lose none of the privileges bestowed upon her. In process of time, the clergy withdrew their own members entirely from the power of the civil courts ; and under multiplied pretences, they formed

med to themselves an exclusive jurisdiction over the greatest part of the national business in Europe. As the notaries who formed the writs of private parties were all clergymen, one of the most successful devices fallen upon, was, to insert in private contracts and obligations, a solemn oath, binding the performance. This oath became a fixed clause of style, and carried every question respecting the performance to the ecclesiastical courts. If the person who had bound himself, and made the oath to performance, failed in doing so, the other party immediately made his complaint to the bishop, and their officials, who issued consecutive orders against them to the number of three, requiring them specifically to perform their obligations; whether such performance consisted in *facta praestanda*, or in payment of liquid debts. If after all the party refused or delayed, the ecclesiastics, without considering the circumstances of the case, issued out the terrible sentence of excommunication; excluding the unhappy debtor from the sacraments of the church,—cutting him off from Christian society,—discharging every body from selling him the necessaries of life, or from holding intercourse with him of any kind. The churchmen had not the power of inflicting bodily punishment upon the disobedient, but they reached that end in the most effectual manner, by forcing the secular judges to exert the civil power against the persons excommunicated, until they procured absolution from the ecclesiastical sentence. The frequency of these sentences, in course of time, diminished that respect due to oaths, and to excommunication itself. Various methods were put in practice to uphold their efficacy. In order to this, the canonists invented a clause, once celebrated all over Europe, and now sunk in oblivion; it was termed the clause *de nisi*. The purpose was, that in place of delaying the excommunication until an actual breach of faith took place, it was consented to by the contract; and fulminated immediately after executing the deeds against such of the parties, as might thereafter happen to fail in performance. The bishop declared that he did ‘*ex nunc, prout ex tunc, et ex tunc prout ex nunc,*

‘ now as then, and then as now, publicly excommunicate and anathematise the party who should fail in good faith and performance to each other.’ The clause *de nisi* came to be inserted in deeds as common style, and the terms of it were, ‘ obligamus nos sub poenis camerae apostolicae et per obligationem *de nisi*.’

We have said that the ecclesiastical jurisdiction established itself in France, in England, and in Scotland. During the Anglo-Saxon government, as formerly mentioned, the bishop and the sheriff acted jointly, and aided one another; but upon the Norman Conquest, William separated the two courts, and assigned them respective jurisdictions. From that time the ecclesiastics bent their whole power, influence, and attention, to draw to themselves the civil business of the nation. The great engine made use of for this purpose, was a method which they termed the proroguing of their jurisdiction by making parties to suits consent to accept of their determination. From being arbiters in particular cases, their notaries inserted clauses of consent in all private deeds which they were called upon to make out; so that in Scotland and in France, they may be said, at a certain period, to have made their point good. The English opposed them with more spirit than any other people. It does not appear, that in England, the bishops were ever allowed to issue writs by their own authority, for imprisoning the persons of those who lay under excommunication; they were obliged to require the aid of the civil power to support their sentences. Though the ecclesiastical jurisdiction has been long confined to what they term its proper bounds; yet still, the sentence of excommunication may be inflicted upon various occasions; and still a man may be imprisoned in England, for disobedience of the order of the church. The church of England receded to a less distance from that of Rome than any other of the reformed religion. To us who grieve at its fetters altogether, it must appear to be passing strange that a people so enamoured of political liberty should suffer a power of this kind to subsist in these times; and that Sir William Blackstone

stone should call the interposition of the civil power ; ‘ the kindly  
 ‘ lending a supporting hand to a tottering authority.’ This can  
 only be accounted for, by the gentle use, which it seems, is made of  
 this formidable power by the English clergy, by the natural effect  
 of long established custom. We would term the hand that en-  
 forced the excommunications of our ecclesiastic courts, officious and  
 tyrannical ; and we would perhaps consider it to be the most dan-  
 gerous encroachment upon the liberties of this part of the United  
 Kingdom. This liberty, unknown to the south part of the island,  
 we owe to the famous statute 10th Anne cap. 6. § 10. which enacts,  
 ‘ That no civil forfeiture or disability shall be incurred by reason of  
 ‘ any excommunication or prosecution, in order to excommunica-  
 ‘ tion by the church judicatures in Scotland ; and all civil magi-  
 ‘ strates are prohibited to compel any persons to appear when sum-  
 ‘ moned ; or to give obedience to such sentence when pronounced.’  
 Thus fell to the ground the ecclesiastical power of the Church of  
 Scotland over the persons of the subject.

After the history of clerical imprisonment in England, it will be  
 proper to attend to the progress it once made in our own country.  
 Amongst the laws of Fordun, Boethius, and other writers of the  
 Scot’s Chronicles, we find the following, and a number of simi-  
 lar institutions, which according to them, are of the highest  
 antiquity.—‘ *Item*, That all bishops of this realm shall have  
 ‘ power to decide before them, all actions pertaining to faith  
 ‘ of body, with power to cause the peple keep their faith, promit-  
 ‘ tit to their neighbours, and to punish them for violation thereof.’  
 We have, however, more positive authority for our direction in  
 this matter ; by chap. 6. of the statutes of Robert III. it was ordain-  
 ed, ‘ That all justiciars, sheriffs, and others, the King’s ministers,  
 ‘ shall await upon, and answer to all letters of caption to be direct  
 ‘ to them, be all bishops and their officials ; and shall cause mak law-  
 ‘ ful execution of the same, conform to the old form, notwith-  
 ‘ standing any appellations or reasons alledged or preponed to the  
 ‘ contrarie.’



' *contrarie* \*.' From this, it appears, that in the days of Robert III. letters of caption for imprisoning the person of the subject, were directly granted by the bishops and their officials themselves ; and that the civil judges acted under them as ministerial officers. These letters are here said to be '*conform to the auld form*;' so that this branch of the ecclesiastical jurisdiction must have been established at a period too remote to be ascertained by any history or record we are now possessed of. At the period when this statute was enacted, excommunication in the other countries of Europe had been extended to personal debts, and to the purpose of enforcing all manner of private contracts ; so that we cannot entertain a doubt, that the caption here mentioned proceeded for personal debts, the payment whereof was enjoined by ecclesiastical censures. By another article of the same statute, such as considered themselves wronged in the matter of excommunication, are allowed an appeal to the conservator of the clergy at any time within forty days. This was an officer elected within the kingdom, for determining all clerical disputes, upon account of the great schism which at that time subsisted in the church, in consequence of the contested election of the two Popes, Urban and Clement. At this time, people apprehended for lesser crimes, and for contumacy in civil actions, were liberated upon finding pledges and caution, as they continue to be at this moment. The 14th statute of Robert III. points out those high criminals for whom no caution could be received ; such as murderers, notorious thieves, wilful fire raisers, and amongst these we find persons excommunicated, taken by the command of the bishop. No further light is thrown upon this matter by our more ancient written laws ; but the subject is immediately taken up by our Statute Book, which begins with James I.

Lord Kaimes favoured the public with a very ingenious tract upon personal execution for payment of debt, to which the present subject

\* Balfour, p. 682.

subject will oblige us frequently to refer. ‘The first statute (says this respectable author) in this island, introducing personal execution, is the 11th of Edward I. which, as appears from the preamble, was ‘to secure merchants and encourage trade\*.’ His Lordship has here been led into a mistake, the first statute that introduced personal execution, is that of Marlebridge, in the 52d year of Henry III. the father of Edward I. The act provides, ‘That if bailiffs, who ought to make account to their Lords, do withdraw themselves, and have no lands or tenements, whereby they may be distrained, then they shall be attached by their bodies; so that the sheriff, in whose bailiwick they may be found, shall make them to come to make their account.’ This act was afterwards almost literally adopted in Scotland. This appears by the act of Robert III. chap. 14. already mentioned; for among those prisoners who could not be admitted to bail, particular mention is made of baillies, ‘who make not just count to their masters, but at foot of the account rests owing to them arrearages or certain sums.’ Edward I. was the next Prince who introduced personal execution by express statute. The great body of the people, neglected and oppressed, came at that time, from certain political causes, to be held in more estimation. The advantages of commerce began to be felt, and the good policy of Edward gave it every encouragement. Without an alteration of the law, the progress of mercantile people must have stopt, because it afforded them no method sufficiently effectual for the recovery of their debts. Edward, therefore, in the 11th year of his reign, obtained the famous act, called *Statute Merchant*. It narrates that many merchants had fallen into poverty, for want of a speedy remedy for recovering their debts; and, therefore, after subjecting the moveable goods for payment, it provides, ‘That failing goods, the body of the debtor is to be taken and kept in prison till he agrees with his creditor.’ This act was extended, and in many respects

\* Law Tracts, p. 345.

respects improved, by another statute passed in the 13th year of the same Prince. Whatever enmity subsisted at this period, between the nations of England and Scotland, such was the similarity of their laws and usages, that Robert Bruce, superior to national prejudices, did not hesitate to borrow good laws from Edward, the determined enemy of his family. By him the Statute Merchant was transplanted, almost verbatim, into Scotland\*.

The statute of Edward establishes a record of recognisance, *i. e.* it supposes, that the debtor acknowledges the debt, which therefore renders the common trial by jury quite unnecessary. The recognisance is held as a judgment; and the imprisonment was a direct execution of that judgment. The Scottish act does not appoint a recognisance, it supposes, that the debt is owing by judgment of assize, or by any other manner, so that the imprisonment awarded is also an execution of the decree. This is the first statute which in this kingdom introduced the direct imprisonment of the person of the debtor for a civil debt; but the effect of it with us, was, as in England, limited to debts due to merchants. In all other cases, the ancient law of the realm subsisted. Lord Kaimes supposes, that the statute of Robert I. is the real foundation of the *act of warding* peculiar to our royal boroughs. This conjecture of his Lordship, is equally ingenious, as it is in the highest degree probable. \*From a variety of laws in our old capitulary, we find that the difficulty of recovering debts from strangers and country people, due to the trafficking inhabitants of our towns, introduced a number of short processes, both in the matter of poinding and moveables, and attachment of land within borough. The statutes of Edward and of Robert, are both directed to the magistrates of towns, calculated for supporting their commerce, and expediting their payments. It is, therefore, most reasonable to suppose, that our boroughs gladly accepted the benefit of this law.

Excepting

\* Vide, 2d Stat. of Robert I. cap. 19.

Excepting the caption issued by the ecclesiastics against persons excommunicated, the act of warding is not only the earliest, but what is still more worthy of observation, it continues at this moment, to be the only direct and reasonable execution for payment of debt in this kingdom ; all the rest are indirect, or properly speaking, fictions of the law. The common execution of a burgal decree, is by poinding and imprisonment. It corresponds to the statute of Robert I. with this variation, that the statute appoints the body of the debtor first to be seized, and then his goods comprised and delivered for payment ; whereas the practice in the act of warding, agreed with the original law of the island, which directs the moveable goods of the party to be applied to payment of the debt, before the person could be touched. According to the present practice, the town-officers in Edinburgh, at least, never give themselves the trouble of searching for moveables ; but they scruple not to certify with great solemnity, that they have done so. The act of warding, therefore, is a direct execution against persons within borough, simple in its principles, and prompt in execution. It is to be remembered, however, that by these principles, and by the form of the warrant, it can, or at least, ought to be issued only for liquid debts ; and not *ad facta praeſtanda* ; because no poinding or appriſement of moveables can proceed, but upon a clear and ſpecial debt, as merchants, debts for the recovery of which the execution was originally intended. Warrants of this kind can only be issued against inhabitants of boroughs ſubject to the jurisdiction of the magiſtrates, which all persons are, who have reſided forty days within the royalty.

The act of warding iſſues upon all writs regiſtered in the books of Royal boroughs, becauſe theſe regiſtrations are decrees of their magiſtrates. It is here neceſſary to mention, that the advantage and convenience of this mode of execution, brought on a very great abuſe in the matter of regiſtration within borough ; bonds, bills, and other writings, were regiſtered without the leaſt regard, either to the reſidence of the parties, or even to any conſent in the clauiſes

of

of registration. This bad practice was corrected by an act of sederunt 10th December 1713. ‘ The Lords of Council and Session, prohibit and discharge all execution by charge, poinding, or arrestment, to pass upon writs registered in the town court books of Edinburgh, or in any other town court books within Scotland, from the first day of January next in all time thereafter; unless such extract or writ bear a special warrant for that effect; and ordain these presents to be printed and published, and a copy thereof to be given to the magistrates of the good town of Edinburgh, that they, and all others concerned, may observe the same, as they shall be answerable.’ In all writs, therefore, which are to be registered in the books of royal boroughs, the clause of registration ought to bear a special consent for the purpose.

We now return to the statute of Robert I. from which this branch of our personal execution originated. Lord Kaimes speaking of the statute merchant of Edward III. proceeds in the following words: ‘ As this was found a successful expedient for obtaining payment of debt, it was afterwards extended to all creditors, by the 25th Edward III. cap. 17. And thus in England, the creditor may begin with attaching the person of his debtor, by a writ named *capias ad satisfaciendum*; the same with an act of warding in Scotland, against inhabitants of royal boroughs. But as this act of Edward III. was not adopted by our Legislature, there is to this day with us no authority for a *capias ad satisfaciendum*, except in the single case of an act of warding\*.’

The vivacity of his Lordship’s genius, in reasoning too quickly from slight analogies, has led him into a mistake. The act 25th of Edward III. did not extend the arrestment of the person to all creditors. This did not happen till the 19th of Henry VII. cap. 9†. In England, the creditor at no period could, nor can now, begin by attaching the person of the debtor, by a *capias ad satisfaciendum*.

It

\* Tracts, p. 346.

† See Blackstone’s Commentaries, vol. iii. p. 281.

It is the *capias ad respondendum*, with which all suits begin ; and no act of Parliament of this island, nor no usage ever allowed any action to be begun by a *capias ad satisfaciendum*. This last writ has no doubt the same effect with an act of warding in Scotland ; but an act of warding is not the beginning of the action, it is a writ for executing a sentence already given by the magistrates of a borough, just as an ordinary caption proceeds on a decree of the Court of Session ; for no act of warding is ever issued, without a previous charge upon fifteen days ; or such a number of days as are mentioned in the clause of registration.

Having thus developed the more remote manners, and positive laws of both parts of the island, in the matter of personal execution, from the earliest periods, down to the commencement of our own regular Parliaments ; we are prepared for the remainder of our journey, through the reigns of the five Jameses ; and for discovering the fundamental principles of the real progress of our personal execution, and the writs authorising it, presently in practice.

The weak irregular government of the Duke of Albany, and the factions of the Nobles, during the long absence of James I. had filled the country with enormities, and heightened the barbarity of the inhabitants to a degree altogether incompatible with any idea of civil government. The power of the law was very little felt even in the centre of the kingdom ; but the Highlanders and Borderers were in a state of absolute ferocity, divided among themselves, and subsisting entirely upon depredations on the middle counties. Upon the return of James, who by long residence at the Court of England, had been the spectator of (comparatively speaking) a regular and advanced government ; he bent his whole power and attention to correct the barbarous manners of his people, and to reduce them under law and order. For this purpose, he was obliged, contrary to his nature, to make large sacrifices to justice ; and we find the greatest part of the statutes of that reign made and directed to that great end. The 86th chap. of his 6th Parliament, determines the

form of process in the Spiritual Court. It is extremely curious, and throws light upon our subject. This is one of the few acts of our Statute Book, which were drawn up in Latin; and is a certain mark, that the churchmen predominated in the Parliament, framed the laws and expressed them in their own manners. It is a statute of the utmost importance in the history of our law. It affords us perfect evidence, that in the reign of James I. the sentences of the church courts both in civil and profane causes, were enforced by excommunication; nay, we learn, that the defenders were obliged to answer under the same pain, and to pay the money decreed within fifteen days after the date of the decree, or submit to be excommunicated. We have already seen, that in consequence of each of these sentences, a writ of caption went out against the debtor, which the sheriff of the county was obliged to execute. From the same act we have undeniable evidence of another very curious circumstance, viz. that the procedure in the courts of common law, and in the church courts, were precisely the same. The excommunication for non-appearance, answers to the *capias ad respondendum*; and the excommunication for non-payment, to the *capias ad satisfaciendum*. There cannot remain a doubt then, that the forms of the common law have been originally copied from those of the church courts. Several other acts of James I. are employed in directing the method of pursuing murderers, felons, and other criminals. The act 89th of the same Parliament, directs the sheriff to use *the King's horn* on the slayers; and to raise the country in his support; and so to take them or fugitate them forth of the realm. The 99th act of the same Parliament orders the King's officers to be distinguished by particular marks, which are retained to this day: 'It is ordained that ilk officiar of the Kingis, as *Mair* or Kingis *serjeand*, and Baronne *serjeand*, sall not pass in the countrie, nor Baronne *serjeand* in the baronnie, but ane *borne* and his *wand*.' At this period, the kingdom was divided into three civil jurisdictions. The sheriffdoms under the King, the regalities under

under the several lords thereof, and the boroughs under their magistrates. *Mair* is a title of high antiquity.—In France, it was an office of importance, and always meant a judge. The *Mair du Palais* was the first officer of state; and the *Mair de la Ville* or *Prevot*, is the first magistrate of a city, as the Lord Mayor still is. In the capitulary of our elder Princes, we find the word *mair* or *marus*, was an officer of court, who executed the citations, and other orders of the judge; and it is probable, that he had a command over the rest of the officers\*. Our macers of Session and Justiciary, are the lineal descendants of these officers. The officers of the different jurisdictions, are by this act ordered to be furnished with *wands* of different colours to distinguish them. *Wands*, or rods, among the northern nations, were held to be ensigns of authority; and in the English statutes, we find several officers appointed to attend the King's courts with painted staves, to take into custody such as were committed by the court. One of the wardens of the Fleet prison is termed *bastan*, the French word for a staff, a term familiar in another part of our forms. The bearing of painted wands by the messengers, ordered by this act, is evidently one of the customs which our James I. borrowed from the English courts, where he had been accustomed to see them. The officers are also to be provided with *horns* to alarm the country; and to proclaim the fugitives from justice to be rebels or outlaws. Though the trumpet be one of the most ancient instruments of martial music, it was only an improvement upon the horn, the undoubted original. Among the Saxons and the Normans, the horn was an implement of the greatest use and consequence. Even Caesar takes notice that the Germans adorned them, and used them in their feasts†.

K k 2

We

\* Vide Skene de Verb. Sig.

† Among the Saxons, the gift, and sometimes the sale of lands, were made by delivery of an instrument in that shape. The famous horn preserved in the Cathedral of York, is made of ivory. Ulphus the proprietor filled it with wine; and kneeling before the altar, 'Deo et Sancto Petro, omnes terras et redditus propinavit.'



We now proceed to the history of the legal diligences. By the 10th act 5th Parliament James II. the sheriffs are ordained, to arrest the persons of spoilers, and charge them to restore the goods taken away, under the pain of 'blawing them to the King's horn as 'rebels.' This act regards the criminal law. Disobedience in this case was certainly a rebellion, and was a proper object for outlawry. The first act of the next Parliament is of a different nature,—it is intended to support the ecclesiastical jurisdiction; and in general, it may be observed, that in these days, our Parliaments opened with a statute in favours of the powers and privileges of the church\*. The old law referred to in this statute, refers to chap. 6th of Robert III. already mentioned; and the only difference is, that by this time, in imitation of the English, the direct power of issuing the caption, which in Robert's time belonged to the bishop or his official, had now reverted to the Crown. The second alteration is, that besides the diligence by caption against the person, the lands and goods of the debtor are to be arrested and appraised to the party, *likeas for other debts*; which clearly proves, that the excommunication and caption authorized by this act, were meant of debts purely civil, which could be satisfied by lands and goods. But the goods are only to be attached, in case the debtor fly from the caption, so that the clerical, as well as the civil law, discharged the attachment both of body and estate at once; if the one was taken, it behoved the other to be free. The next alteration is that, besides being excommunicated by the church, debtors were, in the case of abstracting their persons and leaving no property behind them, to be made rebels to the King, by being proclaimed outlaws or put to the horn†.

This

\* 6th Parliament James II. c. 12.

† The form of the caption issued by the King, against persons excommunicated, in consequence of the act of Parliament above mentioned, was discovered annexed to an old

This executive writ is precisely in the style of the English writ *de excommunicato capiendo*; as may be found from the new *Natura Brevium*, and proves, that our ecclesiastical forms over all Britain, carried the same titles, and were attended with the same effects. The rebellion declared by this act might have been avoided, either by the surrender of the debtor's person or moveable estate; and, therefore, did not appear to be rigorous at the time.

By the 30th act of the 6th Parliament of the same Prince, the method of forcing defenders to appear before the King and Council is set down; the form is exactly the same with the English action at common law, already described; there are three different diets of appearance, and three different fines leviable by distress upon the goods of the defendant, precisely in terms of the English writ of *Distingas*. If after all the defender continues absent, then the cause is to be given against him, and his lands and goods seized for the payment; 'and gif (continues the act) he has no lands nor goods, then shall he be outlawed, and put to the King's horn.' Here is an outlawry provided in civil cases by statute, which did no more than confirm the common law; it might also be avoided by surrender either of goods or person. No other act upon the subject occurs in the reign of James II. who died in the 1457. From these statutes,

old manuscript copy of the Regiam Majestatem. 'Jacobus, &c. Vicecomiti et balivis suis de Aberdeen, nec non dilectis nostris A. B. C. ac eorum cuilibet conjunctum et divisum vicecomitibus nostris in hac parte salutem. Significavit nobis Reverendus in Christo Pater W. L. Episcopus Aberdonensis per suas literas patentes in subsidium Sanctae Matris Ecclesiae, nostrae Regiae Majestatis, brachium invocando. Quod G. F. et R. D. &c. (Here the debt and decret have been recited) Quapropter dictus Reverendus Pater suum processum excommunicationis et aggravationis contra eoldem fulminavit et ipsos tanquam tales publicari et denunciari fecit. Quare vobis precipimus et mandamus quatenus dictos R. G. D. ubicunque poterint inveniri per captionem et incarcerationem corporum eorundem ad satisfaciendum Deo et Sanctae Matri Ecclesiae, ita celeriter compellatis quod pro vestro defectu amplius inde justam queremoniam non audiamus. Ad quod faciendum vobis,' &c.

statutes, we begin to see the foundation of the extraordinary circumstance, which afterwards established itself in the law of Scotland ; I mean that of making rebellion to the Prince the universal consequence of disobedience of his commands in the matter of civil debts as well as crimes. A more unreasonable and cruel usage never took place in the jurisprudence of any country. This barbarity did not suddenly contaminate our law, but crept in by insensible degrees, grew familiar, and kept its footing even to our own times.

No other act appears, relative to this subject, during the reigns of James III. and James IV. excepting that the process of outlawry and horning continued to be awarded by sundry statutes against criminals of various denominations. The opinions of the reformers began to spread in the reign of James V. the clergy imagined that rigorous measures were the most proper for supporting an authority which began to shake to the center. These sentiments produced the 9th act of the 4th Parliament of James V. It shews the degree of passion and terror, which the clergy of the old church allowed themselves to be betrayed into by the times. To this statute, however, we shall be obliged for certain information, in the history of execution of all kinds for debt, and particularly in our present subject, the execution against the person. Many people, it seems, held the horrible sentence of cursing in contempt, so much so, that even the caption granted by the old law, did not force them into obedience. These captions were indiscriminately granted, both for payment of liquid debts, and for performance of facts and deeds. Before this time, the execution of the church decrees were limited to the imprisonment of the body, except in the case where the party fled, and had no lands and goods ; in which case alone, by the act of James II. he could be denounced rebel ; but by this statute of his successor James V. letters were to issue for poinding and apprising their goods, moveable and immoveable ; and if the debt was not thereby paid, and that the persons had been *cursed* for not doing or fulfilling of any act or deed, letters were to be directed

directed 'in the first, second, third, and fourth forms, conform to the 'ordinary letters of cursing.' Besides all this, if the creditor chose, he might have the old letters of caption. Formerly, by the act of James II. if a man had property in moveables and land, his body could not be imprisoned by the caption for liquid debts; and though he wilfully absented, he could not be put to the horn; but by this last statute, his body might at once have been imprisoned, and his property, moveable and immoveable, seized upon at the same time. If the church decree ~~ordained~~ him to do or perform any act or deed, letters of four forms were to issue against him, not in the common style, but in terms of the letters of cursing, so that it behoved him either to obey the church sentence *in terminis*, or be denounced rebel to the King, and thereby forfeit his whole moveables in the first place, and his land in the next. This vengeful statute of the headstrong churchmen of James V. was the first which introduced in Scotland the attachment both of body and goods for liquid debts at the same time, and denounced rebellion for non-performance of facts and deeds, without any inquiry whether the disobedience proceeded from want of ability or want of will. This act is also the first of our statutes, which makes mention of letters of *four forms*; we shall speak to the style of them, after carrying down our statute law upon the subject, the length of the Reformation.

The administration in the minority of Mary, finding the reformers growing in strength and number, applied the old remedy of increasing the penalties of the church censures. To this purpose, an act passed in her 4th Parliament c. 7. anno 1541, ordaining that all persons lying under excommunication for a year and a day, should forfeit or escheat their whole moveables to the Queen, to be disposed of at her Grace's pleasure, after payment of the debt contained in the diligence. By this second oppressive statute, we find that no distinction was made by the churchmen, between liquid debts, or performance of facts and deeds. All were subjected alike to the heaviest censures the church could inflict; and the same consequences

quences provided to follow rebellion to the church, as followed rebellion to the King, without any outlawry, denunciation, or other form, than the excommunication itself.

During all the reigns preceding this period, no provision appears for imprisoning the bodies of debtors for non-payment of civil debts, excepting these debts were constituted by the ecclesiastical judges. From this we may most assuredly infer, that the greatest part of the civil business of the nation had been engrossed by the bishops and their officials; and that very little was left to the other judges ordinary, but the cognisance of crimes and misdemeanours. Accordingly, the whole tenor of our statutes points out, that they were principally so employed.

We now arrive at an act of Parliament, which discovers a third case, in which the penalty of rebellion was made the consequence of non-payment of money. It was formerly mentioned, that as early as the monarchy itself, the King assumed the power or prerogative of imprisoning his subjects for debts due to the Crown. That the same power was exercised in Scotland, no doubt can remain. Accordingly, by the 55th act of the 6th Parliament of Queen Mary, we find, that taxes granted by Parliament, were levied by letters of horning issued by the Privy Council, commanding the subjects to make payment, under the pain of rebellion. The churchmen, it seems, did not relish this method, when put in practice upon themselves, and remonstrated to the Queen. They found immediate redress. The act declares, 'That nae process of horning pass against kirkmen, if the Lords of the Spirituality find some other reasonable method for the payment thereof.' Since, then, the public taxes were raised, under the pain of rebellion, the excessive severity of involving the subjects in the same consequence, for not payment of sums of money, must have before this period disappeared in the eyes of the people, merely by the effect of custom. Whether the horning mentioned in this statute, proceeded upon four forms, *i. e.* four charges, or upon one charge only, cannot with certainty be known

known; the words of the statute seem to point out one charge only. At this remarkable æra, both of our history, and our law, *i. e.* the reign of Mary, it appears, that the process of horning and outlawry had become the sole compulſitor, or writ of execution in all caſes civil and criminal without exception.

The courts in England were eſtabliſhed at an early period, and their executive writs fixed in the beginning of their jurisprudence, continued through ages, and ſtill continue in their original form, alterable by the ſupreme power of the King and Parliament alone. In this country, the Supreme Courts had no ſtability, until the eſtabliſhment of the College of Juſtice. During theſe changes, the King and Privy Council iſſued executive writs upon all emergencies, in which exerciſing the powers of government, apparently abſolute, they changed the ſtyle, ſhortened the legal days of appearance, and enforced their commands by ſuch penalties, as to them ſeemed proper. In this our government exactly copied that of France, whoſe orders are all executed by letters under the *Royal Cachet* or Signet, made out by the Secretaries of State and their clerks, anſwering to our Clerks to the Signet. Letters in the ſame ſtyle are alſo iſſued by the Court of England, but they are entirely limited to matters of ſtate, and to the exerciſe of the royal prerogative. By the Engliſh proceſs, to which our ancient form for ages correſponded, it behoved every defendant to appear in perſon, or to give ſufficient bail for his appearance; and, thereafter, to find ſecond bail for paying obedience to the decreet when given. The inattention of our inferior judges, the changes and irregularities in the procedure of our courts, brought about a total neglect of the preliminary forms. The ancient brieves, or fixed writs of our courts, upon which all actions commenced, were dropped; complaints and ſummonſes ſucceeded; and, conſequently, no previous bail was demanded from the defendant, either for appearance, during the courſe of the action, or for obedience to the ſentence to be given. The ſheriffs and inferior judges, in all events, poſſeſſed only the ancient power

of distressing the debtors or defendants into obedience, by pointing their moveables ; and there it behoved the matter to rest, if the debt happened to be liquid ; but if it consisted in the performance of facts, the party applied to the Supreme Court for their warrant to compel the defendant to obey, under the penalty of being denounced a rebel ; and in this manner the process of outlawry came to be applied with us as the sole executive writ against the persons of debtors.

‘ It is probable (says Lord Kaimes) that the charge necessary to be given upon decrees, did originally proceed upon four distinct letters or warrants ; but it being found that one letter or warrant being a sufficient authority for the four charges, the form was changed according to the model of the letters of four forms latest in use.’ Lord Kaimes conjectures rightly. Our Scottish letters of four forms are nothing else than the writs of *alias*, *pluries*, and *exegi facias*, of which the English outlawry consisted, put together in one writ. Anciently the Scottish outlawry was executed by the sheriff of the county, and differed in nothing from the English \*. The sheriff in England returns that he has sought the party four several times ; and that as he did not appear in court, therefore he had been outlawed, according to the law of the kingdom of England. The writs of outlawry, therefore, answer precisely to our old letters of four forms ; and the return of the sheriff agrees with the four executions of the messenger, who in Scotland, is the sheriff *in that part*. Both of these forms are originally derived from the writ of excommunication ; which, anterior to the final sentence, contained four requisitions. Each of these was executed and published, and returns made of the fact by priests commissioned for the purpose ; so that from the church forms, we had the direct practice of making of sheriffs in that part. This was the method when excommunication had been pronounced by the bishops of the diocese upon  
the

\* Vide the process c. 59. of the Quoniam Attachments.

the spot. Rome was at a distance, and, therefore, when the Pope issued an excommunication, the whole was contained in one bull, which contained four different progressive requisitions, rising in importance above one another\*. Our Judges in Scotland, who upon every occasion copied the forms of the Court of Rome, modelled their letters of outlawry upon that of the Roman bull, and inserted the four forms in one letter. Lord Kaimes supposes that this change took place upon principle, after the progress of industry tended to shorten the multiplicity of legal steps. This circumstance, however, had not the least influence upon the matter. The first alteration was introduced from the practice of government, which has been described by the acts of Parliament preceeding this period of our history, in issuing letters against criminals, for surrendering their persons to trial upon single charges of ten and six days. It was formerly mentioned in what manner creditors in obligations for civil debts, copying after those short forms, made their debtors consent, that letters of horning upon a single charge of six days, should pass against them for payment†. Creditors have always dictated, and debtors obeyed. And it is not in the least surprising, that the latter should have first consented to abridge the number of charges from four to one, *i. e.* to agree that letters of horning should pass against them, in place of four forms; and also to agree to a charge of six days, in place of the ordinary days of law, which were fifteen.

The next change is still more deserving of attention. ‘ In handling this curious subject (says Lord Kaimes) we must be satisfied to grope our way in the dark paths of antiquity, almost without a guide. And the first thing we discover, is, that letters of four forms were not the only warrant for execution *in facta praestanda* ‡.’ His Lordship’s earliest proof of this is an act of Parlia-

L 1 2

ment

\* Vide the celebrated bull of damnation and excommunication, fulminated by Pope Paul III. against Henry VIII. of England, in Bishop Burnet’s Collection of Records, No. 9.

† Vide Clause of Registration.

‡ Elucid. p. 350.



ment in the 1572, posterior to all the laws and historical facts which we have detailed. His general reasoning and conjectures, however, on this point, are both ingenious and just. And we have supported them by proving, that personal execution subsisted in Scotland for payment of debts, by means of the ecclesiastics, beyond the period of any written law or custom we are possessed of. We conclude this period of our history, with an authority from Balfour, which has escaped Lord Kaimes, who supposes that letters of four forms, imposed no other hardship upon the debtor, than to oblige him to surrender his person in ward, if he did not pay. In drawing this conclusion, his Lordship trusted to the letter of the writ; but the law it seems, at that period, put a different construction upon it. 'Letters, (we are told by Balfour) of four forms, gevin conform to ane decreet, aganis ony person, and beand execute against him in all the four charges, be ressonne of his disobedience or contumacy, it is not leasum to him, after the ische and end of the days whereupon he is charged, *purgare moram*; and thereby to eschew the pane of the letters; and mairover, albeit he after the fierd charge, had obeyit the letters, yet the King, be ressonne of his contumacy and contemption, may justly cause him to be denounced rebel, and confiscat of all his moveabell gudes; because, in *decisoriis judiciorum*, sic as execution of sentence, and in criminal trespasses, sic as contumacie, disobedience, and contemption of the King's authority; or yet, quhair ane certain day is affixt, or ane special pane enjoynit, as use is in letters of four forms. *Non admittitur purgatio morae*, 18th February 1546. Lord Lindsay against Alexander Keyninmouth\*.'

Here several of the distinctions which we are apt to make at this distance of time, are all blended together. The disobedient debtor is ranked with the criminal; and though he obeyed at last by surrendering his person, yet, when in prison, he lay, it seems, at the King's  
mercy

\* Balfour, p. 390.

As the ancient compulſitor of their ſentences could no more be uſed, it appears from their books of ſederunt, that, in order to ſupply the defect, Queen Mary, the next year, wrote a letter to the Lords of Seſſion, deſiring them to award letters of horning upon the decrees of commiſſaries, where the ſentences conſiſted *in factō*, and of poinding where it was given for a civil debt. The Lords of Seſſion, it ſeems complied with this requeſt, and a recommendation of the ſame kind was alſo inſerted in the inſtructions to the commiſſaries. The application was made to them by way of a *bill* or petition, which was produced with the decree of the commiſſaries, and the precept duly executed. This is the origin of our preſent *bills* for diligence. The commiſſaries followed the practice of their own court, in which actions were brought in the ſtyle of the civil law, *per modum querelae*, and not by brieves; and from this time forward, the Court of Seſſion were accuſtomed to grant hornings *in factō*, and letters of poinding for liquid debts, upon bare production of the commiſſaries decrees. Thus the commiſſaries, the representatives of the church courts, who had poſſeſſed and been ſuddenly deprived of the moſt complete and perfect modes of execution of their ſentences, were by a kind of juſtice preferred to all inferior courts, and indulged with an execution more expeditious, and leſs expensive, than any other judges of the kingdom. To underſtand this more perfectly, it is neceſſary to recollect, that, when the decrees of ſheriffs, magiſtrates of boroughs, or other inferior judges, were to be executed out of their own juriſdiction, parties were under the neceſſity of bringing a new action before the Court of Seſſion, libelling upon the decree of the lower houſe, and concluding to have a judgment of the Court of Seſſion, in the precise terms of the former. This, when obtained, was termed *a decret conform*; and warranted diligence in any part of the kingdom. The principle of the form, was, that the king was underſtood to be preſent in the Supreme Court, and to execute its judgments; but he was not underſtood to be preſent in inferior courts, or of conſequence to  
execute

execute the decrees pronounced by them. This second decree was an expensive and dilatory form ; and it was first dispensed with in favour of the commissaries, the representatives of the old ecclesiastical judges. Thus the acts of the irregular convention 1560, came to be carried into execution ; *inter alia*, it is there said, ' That ordinances are made in what manner supplications *per modum querelae* should be pursued before the temporal judge, and *nae mair* before the spiritual judge.'

During the preceeding reigns, we have found no laws authorising the execution against the persons of debtors, but such as passed in aid of the church courts, or for non-payment of the public taxes, and *ad facta praestanda*. These executions were held sufficient for the purposes of the kingdom ; and our writers are greatly mistaken, when they suppose, that personal execution for payment of liquid sums took place only after the Reformation. In the latter reigns of James V. and Mary, we have seen the churchmen call into their support, the whole civil compulsitors against the goods and lands of debtors for liquid debts, and even letters to make them rebels to the king. All these dreadful powers fell at the Reformation ; the ecclesiastical courts were new modelled, and entirely stripped of the terrible weapons wielded by their predecessors. Since people could no longer be excommunicated for not payment of their debts, and since the whole ecclesiastical compulsitors were fallen to the ground, it is natural to suppose that it behoved a set of new diligences or executorials to be entrusted in different hands ; and that rebellion to the King would be quickly substituted, in place of the excommunication. While the ecclesiastical courts had such weapons in their hands to enforce the recovery of civil debts, the defect of execution in the other judges ordinary were not much felt or regarded. The acts of Parliament, which we are now to consider in their order, are a clear proof of this. They restore personal diligence in another shape ; which restoration has been mistaken by our writers for the original introduction of it. Whatever reformation religion underwent

went at this period, it cannot be said that the morals of the people were much mended. So frequent had denunciations of rebellion become for civil debts, that the escheats and forfeitures following upon them, proved to be a constant subject of avarice and rapacity to the people in power, and their creatures. The practice was shameful to government, and destructive of national manners; yet to such a monstrous length was it carried, that gifts of the escheats of individuals were applied for and obtained, to take place, when they might afterwards happen to be denounced rebels\*. The hint of this infamous practice was evidently taken from the ecclesiastics. They solicited the benefices of their brethren, when living and in good health, as we do offices now, and the clause in the gift is verbatim copied from the clause *de nisi*, formerly explained, which, by a forehand ceremony, excommunicated people, when they should happen to fail in their contracts. It is no wonder that this transaction should be discharged by statute; for how many snares must have been laid in the way of innocent men, at the instance of those who had so much interest in betraying them into rebellion?

The reformed clergy, in abolishing the powers of the church courts, had been, as they were in every thing, rash and precipitate. They made no distinction between persons cursed for civil debts, and those cursed for disobedience to the private dictates of the church, in matters of religion. The new clergy soon found out their mistake, and corrected it by procuring to themselves the restoration of the whole censures of the old church in its utmost severity. This was done by the 53d of the 3d Parliament of James VI. anno 1572.

By this statute, the whole ancient power of the Roman Church was restored to the Church of Scotland, in matters of their own discipline, with this difference only, that the letters of caption, in place of proceeding upon the warrant of excommunication, as in the

\* Vide the 23d act of the 1st Parliament of James VI. anno 1567.

the days of James V. *i. e.* for imprisoning the body of the debtor as a rebel to God Almighty, proceeded upon the letters of four forms for imprisoning him as a rebel to the King; and ever since the Reformation, rebellion against the King, has been the sole foundation in this country for execution against the person in all cases civil and ecclesiastical. It has the same effect in criminal matters, where parties fly from justice.

The next statute enacted in behalf of this branch of the law, is the 75th of the 6th Parliament of James VI. This statute is of very great importance, and remains partly in force at present. The disobedience which the statute complains of, was a natural and unavoidable consequence of debasing the Sovereign's authority, rendering it the sole ground of common and mean execution of the recovery of petty debts between the subjects. When punishment is totally disproportionate to the crime, the common sense of mankind will bring them to a level, and must, in the end, get the better of positive institutions. This act makes no distinction between rebels for crimes, and rebels for not payment of debts; but the people soon saw and acknowledged the solid and true distinction. The real crime came to be termed *rebellion*, and the other only *civil rebellion*. The last was often innocent and unavoidable; for by this time, people were denounced principally by means of registrations of consent for not payment of liquid debts, without any alternative of saving themselves by surrender of their persons to prison. Instead of altering the mode of the personal execution, for which they had a direct model in the acts of warding of royal boroughs, government were pleased to increase the very cause of the evil, and involve innocent debtors, criminals, and rebels in the very same punishment. The Lords of Session, it seems, in order to heighten their own authority, had been the first authors of this cruel and impolitic measure; \* and government were weak enough to adopt it from them. This act explains the clause in the letters of four forms, which was

VOL. I.

M m

immediately

\* Vide the Act.

immediately inserted in consequence of the statute, viz. ‘ and immediately after your said denunciation, that ye make intimation to the sheriff of our shire, where our said rebel is, and sicklike to thesaury and his clerk, conform to our act of Parliament made thereanent.’ To make the matter perfectly sure, a register of hornings is appointed. From this we see the cruel and impolitic origin of this register. It was merely to supply the defect of private information given to the Crown, which had been ordered by the Lords of Session, and by the tenor of the diligence. This record, unlike the rest of our registers, was founded to increase the misery, and not to be subservient to the utility of the people; nor has it, from the date of this act to the present moment, been of any material service to the national business. It is a dead form, supported only by the fees annexed to it. The next clause of the act establishes the mode of relaxation, which is likewise appointed to be registered, in order to relax the debtors; so that this record formed a charge and discharge of rebellion between the King and his subjects. The act next proceeds to direct the mode of levying the escheats. This extraordinary statute concludes with making provision for a case, which, considering the nature of the enactment, might well be expected to have happened, viz. resistance upon the part of the subject. From the lamentable weakness of the Scotch monarchy, arose the barbarous letters of fire and sword, which we see authorised by this statute. The king was to pillage one part of his subjects for pretended rebellion, and for not paying their debts; and the execution of this robbery was to be committed to others of the subjects, armed with letters of fire and sword. The traffic of these escheats, and the mode of their execution, tended greatly to kindle and spread those deadly feuds, which embittered the after days of this Prince; and which his better notions of government, and the real power to which he succeeded, was never able to extinguish.

We observed, that, after the Reformation, the want of the personal execution, which the church courts afforded for liquid debts

was very soon felt; because no other diligence now proceeded upon them in common, but letters of poinding against their lands and moveables. In this situation, creditors were easily disappointed by the debtors concealing their property, and holding it under borrowed names. The first remedy attempted to be applied, was by the Lords of Session in the 1582, who appointed, 'That letters of horning, as well as of poinding shall be directed upon decreets for liquid sums, in the same manner as formerly given upon decreets, *' ad facta praeſtanda ;'* and this act of ſederunt is ratified by the act 139. Parliament 1584.

It is here to be particularly obſerved, that the horning and poinding contained in the ſtatute, are declared to be 'the one not prejudicial to the other.' Theſe are words that well deſerve elucidation,—they introduced into our law, what was till then unknown, execution againſt the body, lands, and goods of debtors for liquid debts, all at once and by one writ. We have heard, that by the ancient law, the body could not be imprifoned for civil debt. We have heard, that if a man be taken upon the writ of *capias ad ſatisfaciendum* in England, it is held to be an execution of the higheſt nature, and nothing farther can proceed againſt his eſtate or effects. Even by the act of James V. 1535, a man excommunicated for debt could only be taken by virtue of a caption; and, if that was done, no poinding could proceed. The civil courts never had any ſuch powers, and the effect even of the act of James V. as to poinding and arreſtment, vaniſhed with the religion to which it belonged. Letters of four forms and decrees of conſent, afterwards proceeded for liquid debts; but if the debtor ſurrendered himſelf to ward in obedience to the letters, there the proceſs muſt have reſted. A man taken by the *capias ad ſatisfaciendum* in England, might have continued in priſon, and retained his property, as is often done at this moment. A debtor in Scotland might have done the ſame thing. At laſt the Court of Session found, that his property might, notwithstanding, be poinded; but, before this could be done, it be-

hoved the creditor to relieve the person of his debtor out of prison. The following clear and plain authority from Balfour, at once proves and explains this very material point in our law : ‘ Decrete beand given before ane judge againis ony person for payment of ony liquidate sum or debt, with letters executorials thereupon ; under the pane of warding of his persone, gif he beand denounced rebel, and put to the horn, enters his person in ward, conform to the said letters, intending thereby to evacuate and eschew farder execution of the said decrete aganis him, sic as poinding or comprising : the Lords at the instance of the party in quhais favours decrete is given, may direct their letters to poind and distrenzie the said persons movabell gudes and gear, againis whom the decree is given ; and failzeing thereof, to apprise his lands and heritage ; providing always that the said person be relievit out of ward, and put to liberty. November 1558, Gillraith against Edingtoun \*.’

There is an evident inconsistency in the style of the letters of four forms, which is explained by the act of Parliament. I mean, that an inventory should be made of the effects of the debtor, as the property of the King, in consequence of the rebellion, and ordered to be seized upon, and inbrought to his use ; and yet that the messenger should be the next moment authorised to poind and apprise them for the debt due to the complainer in the letters. The Writers to the Signet did not attempt to reconcile this ; but retained the old style of the four forms, and obeyed the act of Parliament, by adding the poinding, the contradiction between which, affords the most complete evidence, that the poinding was inconsistent with the warrant against the person ; or, in other words, that execution both against the person and effects of the debtor in one writ, was contrary to the common law of the realm, and came to be joined only by the force of the act of Parliament last mentioned ; and we shal afterwards see, that our present letters of horning have continued t  
th

\* Balfour, p. 392.



mode of putting their judgments into execution than their inferiors ; and, therefore, upon the 23d of November 1613, the Lords adopted the letters of horning, and entirely laid aside the old letters of four forms. From this time the universal writ, issued by the Court of Session for the execution of their own sentences, and of the decrees of the other inferior judges, came to be letters of horning upon a single charge of fifteen days, which are the ancient *induciae* of all ordinary decrees, or upon six days, in terms of the consent of parties in decrees of registration. All the orders of government, and all the civil business of this nation, were also enforced by letters of horning on single charges. By force of these alone, public taxations were collected, fines were levied, and in short, the whole laws of the police of the kingdom were executed. We do not mean in this place, to enter into the legal consequences of the civil outlawry or rebellion so established. Every circumstance of that matter may be found in the decisions of the Court, during the last century, and in our writers upon the institutions of the law. It is enough to observe, that these consequences were equally penal, equally terrible, as in the outlawry or fugitation for the highest crimes, nor do our ancient statutes mark any distinction between these cases. We wish only to give the great outlines of the progress of our forms, to show their connection with the national manners, and to descend into those particulars only, from which the styles and the customs, which are the proper objects of practice, have originated.

In the days of Mr Dallas of St Martin, the passing of the gifts of escheats constituted a great part of the business of a writer, and accordingly, he has made it the subject of the second part of his styles ; an unquestionable proof of the height to which this corrupt branch of business had arrived in the reign of Charles II. Even in the beginning of the present century, it continued to be made, as Lord Kaimes says, a handle of oppression, and as then understood, even the single escheat was a terrible prerogative of the law of Scotland. The liferent escheat belonging to subject superiors was no less so.

Nay,

Nay, so great was the influence which this last was supposed to bestow, that the then administration from timidity, not from virtue, were happily induced to abrogate the whole consequences of civil rebellion by the jurisdiction act 1746, 20th George II. c. 50. §. 11. Thus our Scots process of horning and outlawry was, notwithstanding the style, reduced to a warrant for personal execution—to an act of warding universal over the kingdom,—or to the simple executive writ of *capias ad satisfaciendum*. After deviating in form and principle for several hundred years, the law of both England and Scotland have in substance entirely coincided. By the ancient and original common law of both kingdoms, the body of no subject could be imprisoned for a debt merely civil. The English, to get the better of this maxim, feigned a crime, a breach of peace to have been committed by the debtor, and hence arose the writ of *capias ad satisfaciendum*. We, in Scotland, in order to get over the same original principle, feigned a very serious crime, viz. that non-payment of debt was rebellion against the King, and hence our present letters of caption.

*Style*

---

---

### *Style of the Letters of Horning.*

THE laws of the Romans were promulgated and executed by means of letters issued in the name of the Emperors. These letters were sometimes directed to the people in general, at other times to particular cities and provinces, and often to the great officers of the empire. They began with a salute to the person or persons to whom they were addressed ; then the reasons were given which induced the law or regulation, and they concluded with the command itself, which is the natural form of all writs of this kind.

The Princes of modern Europe, inclined to govern upon the same principles, received the Roman law into their respective dominions, and struggled to establish it as the universal rule, even in preference to their own ancient customs. In the Emperors they found models for every situation which they themselves wished to arrive at, and nothing could be more enviable or flattering, than the power of making what laws they pleased, and executing them by the imperial method of issuing *letters*. These forms were established at the earliest periods of our monarchies. In France the civil and criminal business, the police of the kingdom, and the affairs of state, have been, and still continue to be, managed and executed by *letters*, the general style or form of which are the same, though each of them has obtained a different title taken from the particular subject upon which it is directed. The general title is *Lettres Royaux*, and these are separated into three kinds, the *Lettres d'Etat*, which carry the orders

orders of state and government ; *Lettres de Grace*, such as pardons, dispensations, &c. flowing from the grace or liberality of the Sovereign ; and *Lettres de Justice* founded upon the law of the kingdom, and which carry the orders of the supreme power for the execution of the municipal law, at the instance of the subjects against each other. In the early periods of the English monarchy, when one individual was injured by another in a matter of property, he was obliged to apply to the Chancellor of the realm. The Chancellor heard the circumstances of the case ; and if the complainant was entitled to a remedy in the law, that officer formed a writ in the King's name, directed to the proper judge, requiring him to do justice in that behalf. These forms were collected into a register under the title of *briefes*, and the *registrum brevium* is the most ancient book of the law of England. As the briefes for bringing parties into courts were thus early established, the writs for the execution of their decrees when given, were also fixed to a precise style, alterable only by the King and the Parliament. Each court has its own peculiar writs of execution for rendering sentences given in it effectual, which are all issued in the King's name, and formed upon the precise words of the judgment of court. These answer to the French letters of justice. In matters of state, or in the execution of those things immediately under the royal prerogative, the Kings of England in ancient times did, and continue still to issue letters in a style and form exactly coinciding with the *Lettres d'Etat*, the absolute mandates of the French. Such are proclamations, warrants for executing criminals, holding courts-martial, &c.

In this country the ancient briefes fell by degrees into disuse, leaving a few behind which have continued in practice. Our Supreme Courts at these times had very little stability,—changes of judges, of their judicative powers, and consequently of their mode of procedure, were frequent and sudden. In this situation, the executive writs suffered proportionable variations, till at last the form of the French letters were adopted by the government, and issued upon all

occasions civil and criminal. With regard to execution against the person, we have heard that it came to proceed upon disobedience to one of these royal mandates, and that a debtor is not imprisoned for refusing to pay his debt, but for rebellion to the King. The horning, therefore, was considered in a light perfectly different from the ancient writs of execution, it is a direct order from the Sovereign to pay the debt or be denounced rebel to the state, and be put out of the protection of the law. It differs very little from a *lettre de cachet* of France, which is a particular letter or command of state, directed against an individual subject. On a former occasion we pointed out the model, from which our letters of four forms were copied, and we demonstrated that our present horning is exactly the letters of four forms abridged, and reduced to one charge of payment, without the old alternative of surrendering the person. After the briefs and executive writs of our original law went out of practice, the other mandates of government will all be found to be modelled in the same style, made out by the same officers, and issued by the same authority, viz. by the Clerk or Secretary of the Privy Council of Scotland, and his assistants, who came to be termed *Clerks to the Signet*.

From the causes just mentioned, has arisen the capital difference between the executive writs of Scotland and England, and the coincidence of ours with the forms and practice of France. We know very little difference in the style or form of letters of state issued in exercise of the royal prerogative, and letters issued in execution of civil justice, or of the sentences of the courts; and hence, as in France, we have a great variety of letters under the general name of signet letters, distinguished by the subjects of their respective direction; but in style and form, there is no difference between proclamations and other mandates of the state, issued in exercise of the royal prerogative. Our Scottish Princes of the latter ages, so far from being possessed of real power, were themselves governed by the violence of the faction accidentally predominant at the time; yet  
they

they issued out letters upon every emergency framed *pro re nata*, without the least regard to law, custom, or to the liberty of the people.

President Montesquieu observing, when in England, the form of the British executive writs, and that all of them proceeded in the name, and by the authority of the King alone, who he well knew did not possess the power which seemed to be thereby indicated, makes a reflection worthy of the discernment of so great a man.

‘ It may be that this nation, (says he) having been once subject to arbitrary power, has upon several occasions preserved the style of it, in so much that, upon the foundation of a free government, the forms are preserved of a government that has been absolute\*.’

We now proceed to consider the style of the horning, and in so doing, the commentary we are to make will in a great measure be applicable to the whole of our *signet letters*.

‘ *Charles by the grace of God, King of Great Britain, France and Ireland,*’ &c.—Our Kings originally judged in person, and have ever been supposed to be present, and to support the exercise of justice, by means of their royal prerogative; the noblest part of which, the executive power of the realm, is lodged in the Crown for that purpose. Some of the Princes of Europe affected long pompous titles in their letters and writs, lengthened by a catalogue of their dominions. To these they were particularly proud of adding their conquests. In this they were imitated by their nobility, who in their writs vied with each other, in a vain display of their offices, dignities, and names of their lands. The taste for this inflated style, is justly supposed to have been communicated to the Europeans, by the Princes of the East, during the croisades. The title of our Kings from the earliest ages to the union of the kingdoms, under James VI. was simply *King of Scots*. We find, however, that James VI. upon returning from England, borrowed the addition of the *grace of God*.

N n 2

The

\* Spirit of the Laws, 19. c. 27.

The Kings of England varied their style, as they happened to be successful in their wars, sometimes adding, and at other times omitting the conquests they or their ancestors had made. The reason of the addition of *Defender of the Faith*, adopted by Henry VIII. is well known. It is an excellent specimen of words remaining in deeds, when the causes for which they were inserted are no more. The first and warmest wish of our James VI. upon ascending the throne of England, was to bring about an union with the two kingdoms of England and Scotland, and to extinguish for ever the differences which had subsisted so long between them. With this view, he issued a proclamation in the year 1604, giving his reasons at large, and particularly insisting on the coincidence of the ancient laws of both countries, and the remaining marks which proved them to have been the same people: 'Wherefore, (says James) we have thought good to discontinue the divided names of England and Scotland, out of our legal style; accordingly, we do by these presents, by force of our kingly power and prerogative, assume to ourself, by the clearness of our right, the name and style of King of Great Britain, France and Ireland, Defender of the Faith, and do hereby publicly promulgate and declare the same\*.'

'*To our lovites.*'—The Pope addressed his letters to princes and great men, *dilectis filiis suis*, or *dilecto filio suo*. The Bishops did the same in their diocesan letters. The Kings of Europe adopted the same style in letters or mandates to their subjects, when commissioned to execute any thing by royal authority. The King of England says *to our beloved*, or *well beloved*. The King of France, *à nos amés*, or *à nos bien amés*. And the King of Scotland *to our lovites*; but when vassals or officers are addressed, the King of France says, *à nos amés et feaux*, and the Kings of Scotland *to our right trusty and well beloved*. In France the word *amés* is general to the whole subjects, but *feaux*, or trusty, is only used to the vassals of the Crown.

The

\* Rhymers's Foed. vol. vii. part. ii.

The old English brieves directed to the sheriffs, did not give them any epithet, it was 'Rex vicecomiti suo de A.' The style of our old brieves was the same. The words *dilecto suo* were only used in government letters, or extraordinary mandates addressed to individual subjects. Thus the precepts directed to superiors to enter their vassals, bear, 'dilecto nostro A. B. superiori terrarum infra script.' The reason was, that the superior, being an immediate vassal of the Crown, is, as such, entitled to the distinction here made.

When the brieves went out of practice, and were supplied by letters under the signet, in the form of letters of state, the sheriffs for the first time were termed *lovites*, and the messengers who succeeded them, as *sheriffs in that part*, had the title continued to them. It will be observed, that in the horning of our text book, it is the messengers who are the *lovites*, and such was the style of all the diligences of these days. The reason cannot be given, why for forty or fifty years past, the Writers have transferred the expression of royal kindness from the messengers to their own clients. When this happens to be a nobleman, the old letters made the King term him *our well beloved cousin and counsellor*, all of that high rank being presumed to be related to the Sovereign, besides being by birth his hereditary counsellors. But these swelling titles are now often omitted, in signet letters at least, and a nobleman is described by his usual titles of honour.

'*Messengers, our sheriffs in that part conjunctly and severally, specially constitute.*'—The style and practice of appointing judges and commissaries in that part, were borrowed from the ecclesiastica, the greatest part of whose business was done by these deputations. They were termed *judices in partibus*. At the precise period that we dropped the old forms of our brieves, we began to supply them by the forms of France, where much business was in use to be done by judges and commissioners in that part. This alteration in the form, brought on several most material changes and corruptions in our law. It was principally occasioned by the office of the sheriff  
being



being in the greatest part of Scotland hereditary in families, who, content with the honour, neglected the duty ; nay, from our statutes, we see that they often refused even to hold courts, or to distribute justice to the lieges, far less was the ministerial execution of it to be depended on. After the briefs fell, the regular connection between the sheriff, and the chancery, or the superior courts of the kingdom, also ceased. In England, on the other hand, this connection gained strength with time, and became the great engine upon which the civil government of the kingdom depended. Hence their forms have continued through ages to be the same, nor do they know any thing of sheriffs in that part. The sheriff of the county, by himself or his officers, must execute all the writs of the superior courts, and answer to the public and party for his conduct. The incurable negligence and partialities of the sheriffs in Scotland, forced our debile government to have recourse to the French method of constituting sheriffs in that part. These at first were not messengers or public officers, but any persons who could be got to undertake the business. At first, the writs were directed to the sheriff of the county, *nominatim*, and failing him, to the other persons who undertook to be sheriffs in that part, in order that the business might be done by them, if the other delayed or refused. Where summonses were on one diet even in St Martin's time, they could be executed by any person whatever \*. But as the messengers increased in number, they were employed in exclusion of others. It came, however, to be early established, that none but messengers could execute hornings, because none but the King's officer could denounce any man a rebel. Upon this Balfour has preserved a decision, ' gif ony person be chargit be our Sovereign Lords letters to ' find sovertie to underlay the law before the justice and his de- ' putes, for slauchter, or ony other crime, the executor of the let- ' ters aucht and sould be the sheriffs officers, or officiar of the ' King's

‘ King’s Grace, utherways gif the said person be denouncit rebel,  
 ‘ and put to the horn be ony other officiar or sheriff in that part,  
 ‘ the samen denunciation is of nane avail, and aucht and fould be  
 ‘ reduced.—25th Junii 1535, William Lord Semple against John  
 ‘ Lord Leyle \*.’

‘ *Conjunctly and severally, specially constituted.*’—For a long period the name of the sheriffs in that part, or the messengers, were always filled up, and if the letters gave a warrant for poinding, or executing any thing where resistance was to be apprehended upon the part of the debtor, three or four messengers and sheriffs in that part were inserted *nominatim*. Therefore it was, that these persons are *conjunctly and severally* empowered, in order that one or all of them might act as necessity required. They were also *specially constituted*. To understand this, it will be recollected, that it was a principle in the ancient law of this island, that no judges supreme or inferior, had any jurisdiction, but what was committed by the particular brieve directed to them for the purpose, far less had messengers or sheriffs in that part, who were mere ministerial officers, any power or authority, without being as they are in the style *specially constituted*.

‘ *Greeting.*’—The form of letters from all antiquity, as mentioned on another occasion, bore a salute or wish for the safety of the person to whom it was directed. The Popes added the apostolic benediction : ‘ *Salutem et apostolicam benedictionem.*’ The word *greeting* is from the Latin verb *grator*, and has been used ever since our public writs were issued in English.

‘ *Forsameikleas A. B. as principal, and C. D. as cautioner, by their bond, dated,*’ &c.—In this case, the bond is supposed to be registered in the books of Session, and a decree of the Lords of consequence interponed to it. The King, as mentioned before, is presumed to preside in his Supreme Court, and consequently, to know what

\* Balfour, p. 558.

what has been done, he therefore recites the bond from his own knowledge. Anciently it was presumed that obedience would immediately be given to the decree of the Supreme Court; and, therefore, after obtaining it, parties were obliged to inform the Lords by a bill or petition, that obedience had been *de facto* refused. The old letters of four forms accordingly appear to be always granted upon bills. But after the Court of Session was by act of Parliament authorised to issue both horning and poinding upon their decrees, an express warrant for that purpose was adjected, and from that time, *i. e.* anno 1613, the form of presenting bills upon decrees of the Supreme Court, entirely ceased. Such decrees were held to be warrants sufficient for the Writers to the Signet to expedite, and the Keeper of the Signet to put the King's seal to letters of horning, and other executive writs. This can only be done when the letters proceed in the name of the person obtainer of the decree; for, when another having right to it by assignation or by a service as heir, chooses to have the letters in his name, he must apply in the old manner, and produce that title with his bill, that it may be seen and considered by the Lords, in which case the style of the letters alters to '*Whereas it is humbly meant and shewn to us by our lovite.*' If the decree has been pronounced, or, which is the same thing, the bond registered in an inferior court, then, in terms of one or other of the acts of Parliament we have considered, a bill must be presented requesting the interposition of the Supreme Court, and therefore, the style is the same as already mentioned. The King recites the decree from the bill, and the raiser of the horning is termed the complainer. This, however, cannot be done until the fifteen days, which are the ancient days of law, be expired, and, according to our genuine form, no horning should be given by the Court of Session, unless the precept of the inferior judge be actually executed, and the charge expired. The reason is suggested by the preambles of the act of Parliament formerly under our view. The interposition of the Supreme Court is awarded, in order to supply the defect of the

the

the execution of inferior courts, arising from their limited jurisdiction; and to reach the effects of debtors who withdrew them, in order to elude the execution of the inferior sentence; but, if this has not been done, and the precept of the inferior court has not been disobeyed, there is no necessity for the interposition of a higher authority, and consequently letters of horning ought not to be granted. Therefore it is, that all our bills and letters bear the production of the bailie's or sheriff's precept duly executed, and consequently disobeyed. Practice has dispensed with the actual execution, providing fifteen days be expired from the date of the decree. The reason was, that when debtors retired out of the jurisdiction, and left no house or effects behind them, the precept of the sheriff could not possibly be executed; so that a horning was the only remedy. The clerks to the bills could not know the fact in these cases; they were obliged to trust the assertion of the writer; and, therefore, to shorten matters, they required only the expiration of the fifteen days.

'By their bond dated the                      day of                      for the causes therein specified.'—In executive writs, the obligatory part alone is to be taken notice of, not the reasons inductive of the obligation; because decree being now given, the obligation is, *res judicata*, sufficient to constitute the debt. The original causes of granting, therefore, would be quite impertinent in hornings, or other writs of execution; whereas, in summonses or libels, they are a necessary and important part of the facts set forth. Writers always use this expression, '*for the causes therein specified*,' merely to hint that sufficient causes existed; but the phrase is unnecessary. Next follows the recital of the bond, viz. the date, the sum, the term of payment of the principal, annual rents, and penalty, which always concludes with a general reference to the obligation or decree themselves. The purpose of this is to correct any mistake that may happen in the recital of the diligence, and to show that nothing is meant to be commanded in the letters, but what is authorised by the original ground of the debt itself. Next comes the efficient part of the

O o

letters,

letters, the command of the Prince given in consequence of the reasons assigned in the preamble.

' *Our will is herefore, and we charge you strictly, and command,* &c.—These are the words which differenced the *letters of state* from the *writs of justice*. We have already seen in what manner our writs of justice in Scotland were confounded with letters of state, and consequently the style of the latter applied to both, and the reason of the distinction being preserved in England. From the executive writs of Scotland and France, as adopted in the latter periods of either monarchy, a person would be led to think that justice was done only in both kingdoms because it is the King's pleasure it should be so; for *tel est notre plaisir*, says the one; *our will is herefore*, says the other.

' *That incontinent these our letters seen, ye pass.*'—*Incontinent* is an old formal word once used by the English writers for *immediately*. In this sense it is obsolete in the South, and is only used by us in the forms of writs. To *pass*, is also obsolete in the sense in which it is here put. It is one of the many Gallicisms adopted in Scotland from the style of the French writs, where the verb *passer* is used in this and a variety of other significations.

' *Command and charge the said A. B. and the said C. D. his cautioner, conjunctly and severally, personally or at their respective dwelling-places, to make payment to the said G. D. of the foresaid sum of                      of principal, of                      of expences, and annuals of the said principal for all years bygone resting owing and unpaid.*'

—This clause, in practice, is called the command of the letters. It is the messenger's fixed rule for making out his charges, and therefore principally deserves the attention of the writer who expedes the letters. He is to take care that the command contains nothing but what is precisely due by the warrant or ground of debt, and that no part of the debt be there omitted. He is also to attend to the manner in which the debtors are bound, whether by equal parts or conjunctly and severally, as in the case before us. When any part of  
the

the debt, principal or interest, has been paid, the command of the letters is the place for the mention of it. This is usually done by the general words, '*deducing all partial payments, conform to the receipts or discharges thereof,*' in order to throw the proof of their extent upon the debtor possessed of them. When there is but one known payment, it is specially deducted.

'*And sikklike yearly and termly, during the not payment thereof, the terms of payment of the same being first come and bygone.*'—This clause was intended to save the charges of raising new hornings for payment of sums becoming due *in futuro*, such as in leases, bonds of annuity, &c. Of old, the words '*the terms of payment being first come and bygone,*' were also necessary in the case of bonded debts, when annualrents were considered to be only due from term to term; but, ever since interest has been held by law to be due *de die in diem*, the words are not necessary. This clause has had the effect of supporting a horning raised before the term of payment of a bond. A decision upon that point is thus reported by Durie: 'In an action, the Earl of Galloway *contra* Vauns, the Lords sustained a charge of horning executed by virtue of letters raised before the term of payment contained in the bond whereupon the said letters were raised, seeing the letters bore to charge the party obliged to make payment, when the term of payment was bypast, and that no charge was execute upon the said letters until the term was bypast, albeit the letters were raised before the term; and therefore they repelled the alledgeance, whereby the horning and letters were impugned for that reason \*.'

'*After the form and tenor of the said bond and decret foresaid interponed thereto in all points.*'—These words are added for the same purpose as the general words in the preamble, viz. to correct any errors in the letters for or against the parties, by expressing that the charge is intended to be restricted to the precise terms of the original ground of debt.

*' Within six days next after the charge.'*—The ancient days of law were fifteen. The letters of four forms generally required the same space, though we find them varying considerably. These diligences, for a long time, were not granted of course by the judges. The debtor's residence, in relation to the distance from Edinburgh, or the castle in which he was ordered to surrender his person, was taken into consideration. For this reason it was, that the act 139th of the 8th Parliament of James VI. authorising letters of horning and poiding to be granted upon the decrees of the Lords contains the following proviso: *' Providing always that consideration be had upon the space and days of the charges, and that according to the distance of the defender's dwelling-places, and the quantity of the sums contained in the said decreets.'*

This last part of the act, which directs the Lords to take into consideration the *quantum* of the sum in fixing the days of the charge in their letters, was an idea dictated by humanity. That circumstance has been entirely forgot in practice. However, so far the Lords paid obedience to this act, that, when they abolished the four forms, by their act of Sederunt 1613, they ordered that letters of horning should be directed, upon fifteen days, against such as dwelt upon the south side of the river Dee, and upon twenty-one days against all inhabitants upon the north side thereof. By a former act, *anno* 1600, c. 25. it had been enacted, that no letters should be directed against inhabitants north of the same river, under a shorter charge than fifteen days. The act of Sederunt, with respect to the charge of twenty-one days, may be said to have gone into desuetude, that circumstance being seldom attended to at present, so far as can be learned. The regulation ought to be renewed; for it is certainly a distressing circumstance upon the inhabitants of distant counties to be unable to obtain suspensions of the charges given them. It is true, that caption cannot go out till the horning returns to Edinburgh; but, where the diligence proceeds upon decrees of consent, and charges of six days, they may and are daily poided, before

before it be possible to procure a list upon a suspension. The Lords have varied in their decisions upon this point. In the 1625, they found a charge of horning, given upon six days to a person living upon the north side of the Dee, to be null, although it proceeded upon a bond, consenting that letters should pass upon six days \*. By an after decision in the 1664, they found, that the act of Parliament, ordaining all hornings beyond Dee to be on fifteen days, reaches not to hornings in which, by the agreement of parties, they are restricted to a less number †. The first decision was right; but the Court are not to be blamed for paying such regard to the argument of parties, when we find our legislature, at a much later date, acting upon the same principle.

It is the method of extorting the consent of debtors to unreasonable conditions, which has defeated almost every regulation of the legislature in their favour. This circumstance rendered ineffectual a very proper act made in favours of the inhabitants of Orkney and Shetland, June 16. 1685, ordaining forty days to be the legal time of charge in hornings against them, except where, in clauses of deeds, the parties may have consented to a shorter space. The act of Parliament ought not to have made this exception; the former act of King James VI. should have been remembered, made against unlawful and impossible conditions, whereby the taking a debtor's consent to have himself charged at the market cross of Edinburgh, although living in a distant county, was prohibited. There is, in this point, an astonishing inconsistency in both our law and practice. If a debtor be abroad, he must be charged at the market cross of Edinburgh, pier and shore of Leith, upon sixty days warning, without the least regard to the *induciae* stipulated in the clause of registration. Now, this edictal citation, as it is termed, was not introduced by any special law. It crept into our practice by degrees, and yet it is allowed to have an effect superior to our statute law; at least;

it

\* Durie, 4th February 1625, Stewart *contra* Bruce.

† Stair, December 16. 1664, Laird of Phisloh *contra* Forbes.



it has done what the legislature has not attempted ; it has contradicted the unreasonable stipulation of parties. It is here necessary to observe, that writers have not authority to insert warrants out of the kingdom, as they are termed. Bills must, or at least ought to be presented, requesting that liberty from the Court.

*' Wherein if they faillie, the saids days being first come and bygone, that incontinent thereafter ye denounce them our rebels, put them to the horn, and escheat and inbring all their moveable goods and gear to our use for their contempt.'*—A forfeiture of the moveables of the rebel took place immediately after the denunciation, which was termed the single escheat, from the French *eschoir*, to fall. When the debtor continued a year and a day in this situation, his liferent escheat fell to the superior, i. e. the rents of his lands, or the produce of his heritable property. The order to the messenger to bring in the produce of the moveables to the King's use, is in consequence of an ordinance of the Lords of Session, mentioned in the act, c. 75. 1579, formerly explained ; whereby it was provided, that the officer and the sheriff, immediately after denunciation of any person to the horn, should make a just inventory of his goods, to the effect that the same might be inbrought to his Heinefs use for that contempt. The writers have, with great propriety, borrowed the very words of the act.

*' And also, that ye use the bail remanent order against them prescribed by act of Parliament made thereanent.'*—The act of Parliament here alluded to is the same c. 75. 1579 ; and the remanent order is to registrate the horning, publish the name of the rebel at the market cross of the head sheriffdom, and give notice to the King's treasurer to inventory and seize upon his effects. Of this order, the only part now happily remaining is the registration of the horning. All the rest of the barbarous procedure is at an end. Here the *horning* properly terminates. The next clause,

*' And sicklike, that ye, in our name and authority foresaid, fence, arrest, apprise, compell, poind,' &c.*—is the warrant for poinding and

and arrestment, which being quite distinct from the horning, we reserve for explanation in its proper place.

In the last discourse, we pointed out the statute by which the pointing and arrestment came to be issued in the same letters with the horning, or, in other words, when, for the first time, execution was awarded both against the body and estate of the debtor, and we remarked the inconsistency thereby introduced into our diligence, which was retained even in our present letters of horning. This is the place in which that contradiction appears. The messenger to whom the letters are directed, is ordered to escheat and inbring the moveables of the rebel to his Majesty's use; and yet, in the very next clause, he is ordered to point and arrest them for the sole behoof of the complainer or creditor. This is diametrically opposite to the order prescribed by the act of Parliament, but, at the same time, points out the ancient law of this country, which absolutely refused execution both against the person and effects of the debtor at the same time, for the same debt.

The diligence against the body of the debtor was, as we have heard, limited to the case where he was bound to perform something in his power, which is explained by the following decision preserved by Balfour. 'A decret being given against ony person, and it be not in his power to obey the same, execution should cease against him upon finding caution for damage and interest; bot gif he against whom decret is given, may onyways fulfill the samen, or gif the samen may be easily done by him, he should not be releivit fra the execution thereof albeit he offer the interest in manner foresaid \*.' Accordingly, the horning or diligence against the person is the only execution that can, at this moment, proceed in similar cases: I mean, where parties are decreed *ad facta præstanda*; and, therefore, in writing hornings upon such decreets, we are always to stop at this place, and conclude with 'according to justice.'

The

\* February 1541, Reid against Abbot of Melros.—Balfour, p. 399.

The reason given by our systematic writers for this, is, that poinding cannot proceed for performance of facts, because it is impossible to value the moveable goods of the debtor, or to proportion them to the particular fact he stands charged to perform. This is true ; but it is but one of the reasons, and that a consequential one, arising from the nature of the thing, and not from the history of the law, which shows us that hornings, or personal execution, were, for near two centuries, awarded *ad facta præstanda* before they were issued upon liquid debts. The reason was, first, because the original common law of the island absolutely denied execution for personal debts ; and, secondly, because a subject was obliged to obey the King's order, when it was evidently in his power to obey ; reasons very different from those our lawyers have assigned, which did not at all enter into the original idea of the thing.

*' And, failing of the moveable goods and gear poindable, that ye apprise all and sundry their lands and heritages, conform to act of Parliament, to the avail and quantity of the foresaid sums, and make the said G. completely paid thereof.'*—The act of Parliament here mentioned is the 36th chapter of the 5th Parliament of James III. anno 1469, which did not introduce, as our systematic writers tell us, but only renewed and regulated the mode of apprising (or poinding, as it is termed) the lands of debtors for payment of their debts. Poinding was, of old, a term equally applicable to lands and to moveables. The act of James III. authorised letters both of poinding and apprising moveables and land in a new form ; and, when a warrant for poinding was, by the statute of James VI. appointed to be conjoined with horning in the same letters, the Writers to the Signet, accustomed to make no distinction in these things, added them both to the four forms. When the letters of four charges came to be abridged to one, this addition continued, whereby the expence of separate letters of apprising were saved, as we see from this paragraph in St Martin's Horning ; so that the creditor

ditor, in virtue of this single warrant, might attack the person, the moveables, or the land-property of his debtor at pleasure.

'*After the form and tenor of the said obligation or decret interponed thereto in all points.*'—As reference is made to the grounds of debt for the direction of diligence against the person, so it is here again repeated as the rule of execution against the effects. It will be remarked, that St Martin's Horning is, in fact, a compound of three different diligences, viz. letters of four forms, letters of poinding and arrestment, and letters of apprising upon the act of James III. The apprisings gave place to adjudications in the 1672; and therefore, since that period, the warrant for apprising last mentioned has been laid aside.

'*According to justice.*'—These are the only words of style which distinguish our writs of execution from royal mandates. The generality of the old brieves concluded with the words *secundum legem et consuetudinem regni*, which, when signet letters came in place of brieves, were changed into *according to justice*. The royal letters, in matters of government, never have these words; the only and curious difference is in the style.

'*As you will answer to us thereupon. The which to do we commit to you, conjunctly and severally, our full power by these our letters.*'—This clause is common both to the old brieves and the King's letters. 'As ye will answer to us thereupon,' is a translation of the phrase in the mandates of most of the Princes of Europe. 'Ac prout nobis subinde respondere volueritis nullatenus omittat.' Though the command of the Prince supplies the power to execute; yet, as it was imagined that warrants to the subject to act in the King's name, could not exceed in solemnity and precision; therefore all writs, precepts, and letters, contain a special delegation of authority for the execution of the thing demanded.

'*Delivering them by you duly executed and indorsed again to the bearer.*'—By the bearer is meant the creditor, raiser of the letters, who delivers them to the messenger; and the messenger, after do-

ing his duty, is by these words enjoined to deliver them back duly indorsed, *i. e.* properly executed. Executions, according to the customs of these times, were written on the back, which seems to import, that the back of the letters is the only proper place for writing the execution.

‘*Per decretum Dominorum Concilii.*’—All letters from the King bear the particular authority upon which they are issued, *i. e.* the authority of the court or officer to whom that department is committed. Therefore the letters which passed the signet, by the authority of the Court of Session, were marked ‘*Ex deliberatione Dominorum Concilii,*’ as the Lords were for some time termed, the word *Session* being a posterior addition. When the letters pass upon a bill, the old style is used, ‘*ex deliberatione,*’ alluding to the consideration which the Court is supposed to take of the bill or petition when presented, before granting the desire of it, by the ‘*fiat ut petitur*\*.’ Besides bearing the authority under which they were issued, the letters were signed by the Secretary of State, the Keeper of the Signet, and sometimes by the President of the Council, or other great officers, when the letters concerned the affairs of the public. Letters for expediting private justice were written by the clerks of the  
Secretary,

\* Before, and even after the institution of the College of Justice, the Clerks to the Signet, it seems, sometimes wrote the *fiat ut petitur* upon the bill, to the prejudice of the officers of Court. The Gentlemen of the Signet, at the same period, seem likewise to have used a little liberty with one another, by carrying off bills which did not belong to them, and making out the letters for the clients of their brethren. These wrongs were both redressed by the following curious act, being part of the institution of the College of Justice: ‘*Item, that na Clerk of the Signet enter in the Council-house for delivering of any bills, bot that the deliverance be written by an writer of the Council; and, to provide that nane frustrate another of his labours and profit, that every Clerk of the Signet that writes ony bills mark the samen with his awin name in the bill written within, and the samen sall be delivered to him again or the party, quhilk of them cummis to ask the said bill, they payand to the writer of the deliverance four pennies.*’—5th Parliament of James V. c. 61.

Secretary, or Keeper of the Signet, who were the immediate predecessors of our Writers to the signet; but the letters were not always subscribed by them. Before the 1582, the King's seal, affixed with wax, was the sole mark both of authority and authenticity. In imitation of the French, business of every kind, civil and criminal, public and private, came to be done by *letters*. Of this government paved the way, as formerly mentioned, by ordering their arbitrary and capricious resolutions to be executed by *letters under the signet*. The *Writers*, in civil business, following the example, deserted the styles in their hands, introduced new ones of their own, and gave out letters suited to the particular business and interest of their employers. A stop was endeavoured to be put to these very great evils by act c. 13. of the 10th Parliament of James VI. By this statute, we see a proper distinction established between the signet letters issued by prerogative and by justice. For the form of the latter the *Writers to the Signet* are to be answerable; and we learn from the act, that the original reason of signing the letters was not to add authority to the King's signet, but to make each *Writer to the Signet* answerable for his own works. In place of signing the ordinary letters upon the back, as is mentioned in the act, the Writers continued the practice, already begun, of signing at the foot immediately below '*Per decretum Dominorum Concilii.*' The signatures in Exchequer still continue to be subscribed on the back, in terms of the statute. As the original intention of signing the letters was not to add to their authority, but merely to afford a check upon the Writers, and to oblige them to pay attention to the style, they were not, like deeds or extracts of the Court of Session, subscribed at the junctures of the sheets. The Lords of Session were of opinion, that letters should be so subscribed; and therefore, upon the 8th of July 1691, they issued an order for that purpose, without assigning any reason.

The signet was originally the private cachet of the King, impressed upon white wax, containing the lion and the crown, surrounded

ed with a ring of paper to keep it on. When we began to copy from the French, red wax was used. A particular seal was afterwards appropriated for letters passing under the signet, having nearly the same impression. The business at this office always growing greater, and the number of diligences increasing in proportion to the internal commerce of the country, the sealing, dating, and subscribing of so many letters grew an intolerable burden upon the Keeper of the Signet, and created inconvenient delays and attendance upon the part of the Writers and their clerks. In order to be delivered from these grievances, the Keepers and the Writers joined in a petition to the Lords upon the 18th of February 1718; and, from the date of the act made in consequence of this application, the present expeditious method of stamping the letters has been continued.

In executing the horning, the messenger, the sheriff in that part originally acted as the sheriff of the county would have done, or still does, in the execution of the King's writs. The sheriff reports what he does in obedience to the writs directed to him, and this is termed the *sheriff's return*; but, when those good old forms gave way to the royal letters, messengers and others were employed instead of the sheriffs; and the returns made by them came to be called *executions*, a term of the French practice. The act of the officer in charging the party, or obeying the command of his warrant, is by them, with propriety, termed the execution; and the recital of the fact so done, attested by the officer, is termed the *proces verbal*. Anciently we also distinguished these things in some degree, by terming the act of the messenger the execution, and the certificate of it the indorsement. We have now improperly confounded both in the word *execution*.

The ancient mode of execution was thus: The messenger, having his letters of four forms with him, went to the personal presence of the parties, or to their dwelling-houses, and commanded them to make payment, in terms of the will of his letters; but, from the old executions,



because it bore not the word *copy* \*. It is this copy which is termed a charge of horning, but most improperly. It is only a charge to pay the debt, under the pain of being put to the horn. This has arisen from the impropriety of the term *horning* being given to the letters themselves, which is, however, a statutory epithet, and will, no doubt, be continued.

‘ *In his Majesty’s name and authority, command and charge you M. B. to make payment to the said C. D. of the sum of* ,’ &c.

—The word *charge* is directly from the French *charger*; and the essential requisite of it is to be in precise terms with the will and letters, from which the messenger has not power to deviate in a single iota. The narrative of the horning in the copy must also be taken *verbatim* from the letters; and, if there be any transmissions by assignation, or other right, which carries the debt to the raiser of the horning, these must be recited in the same manner as in the letters. In short, the terms of the letters is the rule to which the messenger must adhere in his copy; for, supposing an error to be in the warrant, he is not entitled to rectify it. The will of the letters must also be the rule for the precise days of the charge; and the certification in the copy is properly referred to the letters. The copy bears also, ‘ *Per decretum Dominorum Concilii* ;’ because the authority under which the letters of horning had been granted, have always been considered as an essential part of it; for which reason, the words of authority are inserted in the copy. The date and the signeting are also essential, because it puts it in the power of the party charged to know with certainty whether such letters have been issued against him or not, and, consequently, deprives the messenger of the possibility of acting upon a false warrant.

When a messenger executes a diligence, he ought to be possessed of the warrant, in order to exhibit it if required. A question of this kind came before the Court 11th July 1699, Lermont against Lermont.

\* Hope, 20th July 1627, Monteith against Kirkwood.



mont. In a process of ranking and sale, it was objected to the execution of a messenger, that he wanted the summons, the warrant thereof; and, being required by the defender's advocate to show it, he refused. The Lords found the messenger not obliged to show his warrant to third parties, not defenders, and that law presumed he had it on him, unless the contrary were proved. If, then, a messenger be obliged to show even a summons to the party defender who demands it, there can be no doubt that he must exhibit the principal letters of horning, otherwise the debtor cannot be obliged to receive a copy; nor will the charge be good for any thing. Of this no question can be made, if the debtor has sufficient presence of mind to take a notorial instrument upon the fact. Where hornings proceed upon decrees against many debtors in different parts of the country, it is the practice to raise two or three letters, so as each messenger may be furnished with his own warrant. Formerly, the copies delivered contained the date in figures, and did not mention the witnesses present; so that the messengers might have got an execution made up *ex post facto* at pleasure. Abuses were accordingly discovered; and, at the time when escheats and other consequences followed upon denunciation to the horn, these abuses called out for correction. Accordingly, by act 12. 1st. Parl. W. M. 1693, it was expressly provided, 'That all copies of summonses, charges, 'inhibitions, arrestments, or other letters whatsoever given to the 'party, shall bear at length, and not in figures, the day and date of 'the delivery thereof; as also, the names and designations of the 'witnesses insert as the execution or indorsation did and doth bear 'the same; certifying the messenger who shall omit to insert the 'said day, and date, and witnesses in his copy, that he shall incur 'deprivation and tinsel of his office.'

'A just copy whereof I have delivered to the said A. personally apprehended in E. upon the said day of and year foregoing, before these witnesses.'--Of all modes of execution, that which is made against the debtor personally is the most certain and unexceptionable.

unexceptionable. It leaves no objection to be made, provided only a copy of the execution be delivered.

'The like copy of charge I left for the said A. within his dwelling house in E. with his servant, to be given to him, because I could not apprehend him personally, upon the said day of before these witnesses.'—The fixed rule, in our executions, is, that if the party be in the kingdom, they must be made to him either personally, or at his dwelling house. An execution, therefore, which mentioned the delivery of a copy to the party's wife was found to be insufficient, because it did not say it was delivered to her in her husband's dwelling house \*. This was a very proper decision; because, had the Court sustained the execution, they would, in fact, have found an execution against the wife to be the same thing as against her husband.

Hornings ought always to be executed at the principal dwelling-houses of the party, as required by act 75. of the Parliament 1540; and therefore executions at lodgings or town-houses, after the family was removed to the country, have repeatedly been found insufficient. It is also requisite to describe the dwelling by its local situation. The reason is, that if the word *dwelling house* was to be held sufficient, the messenger would be judge of that matter; and, tho' false, it behoved his assertion to be received without the possibility of contradiction. The Lords carried this matter so far, that, in a case where an execution bore a charge to be given to a party designed burghers of a town at his dwelling-place, they found it null for want of the word *there*, or in *the said town*, which was certainly attention sufficient to the letter of the law †.

'The like copy of charge I have affixed and left for the said A. upon the most patent gate or door of his dwelling-house, after my knocking six several audible knocks upon the said gate or door, because

\* Stair, 11th December 1679, Countess of Caillies against E. Roxburgh.

† 14th July 1624, Adams against Bailies of Air.

thereof, *i. e.* the messenger blows his horn three times. *Oyefs* is a gross corruption of the imperative of the French verb *oyé*, *hear* ! Denunciation is evidently from the Latin *denunciare*, to foretel, warn, or declare before hand. Craig uses it, in all cases, for to warn in removings. The word in the legal sense used by us, is a direct Gallicism from the French practice. The English term, and the proper one, is *proclamation of rebellion* ; a form analogous to our denunciation, and proceeding exactly upon the same original cause, *viz.* disobedience to the Sovereign's authority.

' *Therefore I B. messenger, passed to the market cross of Edinburgh,*  
' *(or to the market cross of A. head burgh of the sherriffdom thereof,*  
' *within which the said C. resides.)*—Of old, it seems, denunciations were not regularly made at the market cross of the county where the party dwelt, but generally at Edinburgh. This was chiefly owing to the necessity and bad government of the times ; for there were several county towns in the kingdom to which safe access could not be had for business of that kind. The act 75. Parl. 1579, clearly appoints the denunciation to be made at the market cross of the shire where the party dwells ; and, in a case marked in the Dictionary \*, the Lords found, that a party put to the horn must be denounced, conform to the act 1579, notwithstanding one hundred years uninterrupted custom to the contrary †. In the 1666, the Lords found a denunciation at the market cross of Edinburgh, as *communis patria*, sufficient against a party out of the country ‡. The same causes which rendered the denunciations irregular before the act of Parliament, were again attended with the same effects, and brought a number of denunciations to the market cross of Edinburgh. This was attended with one very happy consequence. The absurd custom of single escheats, and other consequences of denunciation, received the first effectual check from this fortunate irregularity. One  
of

\* Vol. 1. p. 261.  
escheat.

† Colvill, 1583, E. Angus against the donator of his

‡ Newbreath, 1st February 1666, Cunningham against Cunningham.—Dict. vol. 1. p. 261.

of these consequences was, that the party could not defend himself in any law suit. But the Lords found, 'That the denunciation at the cross of Edinburgh could not hinder the party denounced to have *personam standi in judicio* \*.' From this decision we learn, that captions upon denunciations at the market cross of Edinburgh came in by a practical abuse, and that the escheat consequent upon the rebellion was considered to be a much heavier punishment than the imprisonment of the person. The Judges, therefore, seem to have passed over every objection which stood in the way of the debtor's imprisonment. They looked upon it as a matter of little moment, and laid hold of every circumstance to prevent the consequences of the escheat. Meantime, creditors who had no interest but to recover their debts, continued to denounce their debtors at the market cross of Edinburgh; and thus a great number of hornings were reduced to be nothing more than steps towards obtaining captions.

'There, after my crying of three several oyeses, making open proclamation and public reading of the within written letters and execution.'—So much were the ideas of our Judges improved towards the end of the last century, and so hateful did the process of escheats appear to them, that they annulled a horning because the denunciation bore only *three oyeses*, in place of three oyeses; so that there was nothing wanting but the letter *r* \*. The decisions varied upon this point in the case of other diligences. The number of the oyeses were not entirely fixed. Fountainhall tells us, that, in a case, 7th December 1698, the Lord Register was ordained to try the custom as to the oyeses; and, though an act of Sederunt was intended to regulate them for the future, it was not made; and so the custom remained unfixed. Practice has certainly, since that time, fixed them to the number of three. Besides crying the oyeses, the messenger

Q q 2

adds,

\* 24th January 1674, Blair against Blair.

† Fount. 20th February 1680, Gordon against Gray.

adds, *making open proclamation.* It is not known what the officer considers the oyeses to be ; for they are certainly open proclamation. Another part of it, is the public reading of the letters, and execution. In a case in Fountainhall, it was objected to a denunciation, that it did not bear the reading of the execution, as it did the horning itself, as was constantly in use to be done, conform to a testificate under the hand of the keeper of the register of hornings. The Lords found, that there was no express law or act of Parliament requiring that solemnity ; and that custom was not come to be so fixed as to be obligatory, there being denunciations both ways ; and, though some cautious messengers adjected that formality, this was not enough to make it grow up to an universal uniform practice ; therefore they repelled the nullity, and sustained the denunciation \*.

*' I duly and lawfully denounced the said A. his Majesty's rebel, and put him to the horn, by three several blasts, for his disobedience.* —The three blasts, like the three oyeses, were not, at first, points of form. Hornings, in the beginning of the seventeenth century, before the injustice of escheats had made a proper impression upon the Judges, were often sustained, though deficient in that article †.

Since the abolition of escheats by the jurisdiction act, the ceremonies of this business are, in most cases, of very little consequence, being only preparatory steps to the caption, or warrant of imprisonment. Accordingly, few or no questions have incurred upon their import, except in the particular case we are soon to mention. If no denunciation is made within year and day of the date of the execution, the charge falls, and the horning must be executed again. This is not only a point of established practice, but is a part of the ancient law common to the whole island of Great Britain. The English carry it farther than we do. If, after judgment obtained,

no

\* 18th July 1702, Bogle against Asmora.

† 4th March 1624, Drysdale against Scornbegg.

no execution be taken out upon it for a year and a day, the law presumes that the sentence of Court has been obeyed ; and no execution can issue until the defendant be again called into Court, to show reason why it should not issue. This directly coincides with our summons of wakening, and, in some degree, with our process of horning ; for, if no denunciation follows within the same space, our law also presumes that obedience has been paid to the charge, until a new one is given to the debtor.

The next step is to register the horning, in terms of the often mentioned act, c. 75. anno 1579. The practice, in these points, is to make a copy of the horning and of the executions almost *verbatim*. This copy is carried to the register of hornings, with the principal letters : There they are compared by the clerk, and the copy retained, in order to be laid up and booked. The clerk next day returns the principal, with two certificates of the registration, and its dates ;—one in the foot of the principal letters, and the other below the executions. This, in terms of the act 1579, must be done within fifteen days of the date of the denunciation. The original purpose of which, was no other than to give information to the Crown of the single cheat having fallen upon the denunciation, that the party might be punished, in terms of that barbarous act. If the registration be omitted within the fifteen days of the denunciation, the practice is to denounce again, and to register the second execution.

As the country was divided into regalties, bailleries, and stewartries, belonging to the great vassals of the Crown, who were not taken notice of in the act 1579, they found themselves hurt by registrations going entirely to the King's sheriffs. They complained, and obtained redress by the 268th act of the 15th Parliament of James VI. which appointed the denunciations to be at the market crosses of the several jurisdictions, and the registration to begin their books. Registrations were at that period judicial acts, a great deal more solemn than any thing we now are accustomed to ; and therefore

fore they could only be done while the Judges were sitting. These Judges from negligence, and oftener from partiality, threw many bats in the way of this form. To remedy these things, another act was made immediately subsequent to the former one, c. 269. of the same Parliament. This act is the original authority of the general register of hornings at Edinburgh. We reserve what we have further to say upon it until we come to treat of the inhibition.

The distinction between a denunciation upon which escheat followed, and that which, by practice, warranted the ordinary caption, was, at an early period, so great, that the latter were granted upon hornings without registration. This was corrected by an act of Se-derunt 19th of November 1679. Government, so far back as the 1592, became sensible of the extreme absurdity of denouncing a man rebel for a civil debt, by no greater solemnity than they proclaimed him a rebel or traitor to the state. By an act of that Parliament, therefore, it was ordained, that letters of treason should thenceforth be executed by heralds or pursuivants, bearing their coats of arms, and not by blasts of a horn, but by sound of trumpet.

The only remainder that we now have of the effect of denunciation regards the currency of annualrent. This was first established by the 20th act of the 20th James VI. anno 1621. The penal effect of this statute was for some time allowed, just as captions were, without either regular denunciation or registration, and that upon the absurd idea of adding to the penalties of civil rebellion. But, by the decisions in the beginning of this century, more liberal Judges so far banished these ideas, disgraceful to our jurisprudence, that, without offending the letter of the law, they found, that unless hornings were denounced and registered in the precise terms of the acts of Parliament, though they might be warrants for captions, they did not entitle the creditor to interest upon the sum total of his diligence. The decisions will be found in the different collections, particularly in Lord Kaimes's remarkable decisions. If, therefore, you intend

intend to accumulate principal and interest into one sum, due by a debt upon which horning has followed, you must be careful to have it denounced at the market cross of the head burgh of the county where the debtor resides, and to have it recorded in the books of the sheriff of the same shire ; for the regalities and other subaltern jurisdictions were totally abolished by the jurisdiction act 1746.

*Caption.*



---

### *Caption.*

**W**HEN a debtor surrendered his person, in terms of the letters of four forms, he became a prisoner, not to the creditor, but to the King; and, of consequence, he was confined in a royal castle, such as Edinburgh, Stirling, Blackness, &c. where, as a prisoner of state, he enjoyed the free air, confined alone to the precincts of garrisons. For this purpose, the debtor himself was, by the four forms, directed to apply to the Keeper of the Signet for letters from the King to the Governour of the Castle, commanding him to receive the bearer, and to detain him in ward, until his Majesty's pleasure should be further known. From the tenor of these warrants, it would appear, that the prisoner might have been liberated at the King's pleasure; and upon principles, we may infer, that this originally was in the King's power, especially since he could have granted a protection to the party against the diligence of his creditor, and all its consequences. The words of the letters of four forms are: 'To enter his person in ward within our Castle of Dunbarton, therein to remain upon his own expences, ay and while he hath fulfilled the command of thir our letters, and be freed by us therefrae.' A debtor who had thus obediently delivered himself to confinement, was undoubtedly under the King's mercy, and, by our old law, was entitled to several advantages. 'Gif any person (says Balfour) be in the King's ward or captivity, all actions intentit against him or contrare any other person, quhill

“quhilk may be prejudicial to his heritage, aucht and fould cease,  
 ‘untill he be freed and relievit of the said ward, and may compear  
 ‘to mak his defence as principal party, or zit for his interes \*.’

As, for a long period, nobody was imprisoned but for refusing to do or perform something which was presumed to be in his power; so, upon the voluntary surrender of a man's person to ward, the nature of the charge was taken into consideration, and the party liberated, upon finding caution to pay damage and interest, in case it was found that performance could not be made *in terminis*. If, on the other hand, the party did not obey the third charge, but allowed himself to be denounced rebel, his obedience came too late; and, though he did deliver up his person, yet he was considered as a rebel, and his escheat took place; but, if he still disobeyed, a warrant was, in the next place, issued out by the Court of Session, under the Signet, to seize him wherever he could be found. ‘Eaque  
 ‘denunciacione facta (says Craig) literae ad quoscunque magistratus  
 ‘in quorum territoriis debitor apprehendi potest, a Senatu dirigun-  
 ‘tur ut debitoris corpus custodiae mandent.’ A caption or warrant of this kind being issued, the situation of the debtor altered greatly to the worse; he was now made guilty of contumacy, disobedience, and rebellion. He had forfeited his rights as a subject; and, therefore, in place of being received under the King's ward in a castle, he was to be seized upon in whatever place, and by whatever magistrate he could be found, and detained in a burgal tolbooth, a dungeon, or any place of confinement nearest to the spot where he happened to be taken. Although our Barons and great proprietors had prisons in their castles, yet these were kept for the punishment of delinquents within their own jurisdictions. They were not obliged to receive debtors, or the prisoners of the King. Our counties never seem to have had prisons appropriated to them as separate jurisdictions; and therefore the royal boroughs came, of necessity, to

R r

have

\* 24th April 1505, Kennedy against Sheriff of Lanark.—Balfour, p. 269.

have the custody of all debtors apprehended for civil debts. In this manner the place of confinement of debtors in Scotland came to be changed from the respectable and wholesome ward of our castles, to the dirty and unhealthful dungeons of our burghs.

The Privy Council of Scotland, and very often the Lords of Session, were in use to issue letters, appointing people accused of crimes, and sometimes merely *super inquirendis*, to appear before them at a day certain, under the pain of rebellion. Lord Stair, in mentioning this kind of procedure, terms these letters *extraordinary executories*; and most extraordinary they were upon many occasions. ' Upon these, (says he), not only denunciation may pass upon which ' escheat and liferent fall; but likewise, in some cases, the certification of these letters is under the pain of treason, in cases where it ' is so appointed by statute or custom; and likewise letters of fire ' and sword, in case of deforcement or resistance of the ordinary ' executions by continued open force in arms. But the charges against ' such persons to enter their persons in such prisons, under the pain ' of treason, are competent for making captions effectual, and should ' be first used before letters of fire and sword, which are the last legal executions warranting all manner of force of arms that is competent in war \*.' Of the captions here mentioned by Lord Stair, we have an instructive instance in the warrant granted by the Privy Council upon the 8th June 1566, against the persons accused of the murder of David Rizzio †. From this act of the Privy Council, we see that the fixed style of the caption is of great antiquity, little or no alteration having been made upon it since the reign of Mary. The principles are also entirely the same; and there was little or no difference between the warrant for seizing a traitor, a murderer, or a debtor. All of them were to be taken not as criminal murderers or debtors, but as rebels to their Sovereign; the one for non-appearance in court, and the other for non-payment of their debt.—We shall now proceed to consider the style of this diligence.

The

\* P. 755.

† Vide Keith's Appendix, p. 132.

The horning being properly executed, denounced, and registered, is given in to the Bill Chamber, with a bill, stating that the debtor had been duly denounced rebel, and put to the horn, for not making payment of such a sum, contained in such a bond, &c. and therewith produced ; therefore praying for letters of caption, in common form. The clerk to the bills examines the horning ; and, finding the formalities duly observed, he writes upon the bill, ‘ *Fiat ut petitur*, because the Lords have seen the registered horning within mentioned.’ This bill is the warrant for expediting the letters of caption. It would be superfluous to enter into the minutiae of the style of the first part of this diligence, as every thing that can be said upon it will be found in the preceeding treatise upon letters of horning. It will be observed, however, that it is not the refusal to pay the debt which, in the preamble or narrative of the caption, the King takes so much amiss ; it is the denunciation to the horn, and the debtor’s continuing in rebellion, in contempt of the laws, which calls forth the resentment of the Sovereign, and seems to justify the stern and peremptory order for imprisonment.

In the course of the history which preceded this discourse, it was mentioned, that the execution of all decrees and sentences of superior courts belonged to sheriffs, stewards, and magistrates of burghs, within their respective jurisdictions, and that this execution proceeded upon writs issued from the superior courts to the inferior judges, who executed them accordingly, and returned a certificate of what they had done in consequence thereof. We likewise remarked, that the extreme negligence of our heritable sheriffs, in doing their duty, introduced the necessity of making *sheriffs in that part* to do the common business of the nation, all of which, to this moment, continues to be performed in England by the municipal officers themselves. In James V.’s time, the heralds, pursuivants, and macers, came to be specially conjoined, as we find from the 58th act of the Institution of the College of Justice, anno 1537. Our ancient statute-book is full of complaints against sheriffs and

judges, who were sometimes fined, deprived, and condemned in payment of the party's debt, which was, no doubt, the proper and natural punishment ; but, owing to the unceasing calamities of the times, no steady methods were practised. Balfour reports three decisions in which the sheriffs and magistrates of towns were subjected by the supreme court, for refusing and delaying to execute decrees, in consequence of letters directed to them, in payment of the debts, and their goods ordered to be poided to the amount.

The extreme weakness of the Scottish government arose chiefly from the Crown being not only entirely stripped of its proper landed patrimony, but even of its political government, by the insatiable nobility, who held their jurisdictions by the same title as that of their estates ; so that the King had little or no authority over the judges, sheriffs, or other officers of his kingdom. We formerly had occasion to observe, that the whole disorders of the kingdom were attributed to the disobedience of authority, and the opportunities of eluding the law, which brought upon the body of the subjects the horning and outlawry for civil rebellion. The same causes involved the inferior judges in the same consequences with a great deal more justice ; for what obedience could be expected from the people, when the civil officers were often themselves the greatest contemners of authority ? Among the many acts compelling inferior judges to their duty, there is a particular one in the 12th Parliament of James VI. c. 126. anno 1587, ' anent the duties of sheriffs and judges ordinar, their deputes and clerks.' They are thereby ordered to put the laws of the realm to due execution, ' Specially in the searching, seeking, following, persuing, apprehending, committing to waird, and presenting to justice of declared traitors and rebels contemmandly remaining at the horn, and standing registrate in their awin bukes unrelaxed, or in doing justice upon them, gif they have commission to that effect ; and, gif they cannot apprehend the saids traitors and rebels within the bounds of their awin jurisdiction, to make denunciation to the sheriffs

‘ riffs and judges ordinar of the four halves about, that sik persons are  
 ‘ fled within their bounds, requiring them to use the like diligence  
 ‘ in searching and apprehension of them, as they will answer to his  
 ‘ Majesty at their peril, and under the same pain that the traitors  
 ‘ or rebels has incurred.’ Notwithstanding this act has met with  
 the approbation of Sir George M’Kenzie, who perhaps found it  
 suitable to the temper of the times, yet, to the present age, it appears  
 fraught with wanton severity. Indeed, nothing can place the mis-  
 erable impotence of the civil government of Scotland in a stronger  
 light than the form now under examination. In the reign of  
 James VI. the government of Scotland appears to have been at regu-  
 lar war with the nation. It inflicted its heaviest punishment, the  
 punishment of rebellion, equally upon the innocent debtor who  
 could not pay, and the judge who delayed to be the instrument of  
 his misfortune. Both were to be involved in rebellion, and to suf-  
 fer the punishment of traitors. Upon these extraordinary princi-  
 ples our caption is modelled; and, without knowing them, the style  
 would be totally unintelligible.

‘ *We charge you, that incontinent thir our letters seen, ye pass, and*  
 ‘ *in our name and authority command and charge the sheriffs of the*  
 ‘ *sheriffdoms,*’ &c.—This is not, in fact, a caption, or plain warrant  
 to incarcerate the party; it is, in reality, a norning, authorising a  
 messenger, or sheriff in that part, to charge the real sheriffs of the  
 county, and other inferior judges, to exert their diligence in search-  
 ing for the debtor. To the list of the inferior judges are added  
 ‘ messengers at arms,’ who, by the act of James V. formerly quoted,  
 were bound to execute the decrees of the supreme judges in con-  
 junction with the sheriffs. Even the other messengers, whose con-  
 currence might be necessary in this business, were not to be required  
 as servants of the King, and executors of the law, but to be charged  
 by the brother messenger to whom the letters of caption are directed,  
 under the same penalty with the other judges.

*' To pass, search, seek, take, and apprehend the said A. B. and C. D. rebels foresaid, wherever they may or can be apprehended within the bounds of their offices and jurisdictions.'*—The letters of horning are only directed to messengers, or sheriffs in that part, because they had nothing to do but to charge and denounce the debtor, in which no assistance was necessary. But the caption is directed in a very different manner. The *apprehending* of a man was an act of too great moment to be affected by a single officer, or even by several of them, without the assistance of the judge of the jurisdiction, and his *posse comitatus*, or officers of the burgh. No attempt of that kind could be made with success, or even with safety. These judges, however, especially those of the regalities, and other heritable jurisdictions, looked upon the interference of the King's messengers, and other sheriffs commissioned for the purpose, with a jealous eye. They considered their attempts as incroachments upon the rights and privileges of their offices, and therefore were naturally inclined to assist rebels of all kinds, and to protect, instead of seizing them. By addressing the letters of caption then directly to the sheriffs, stewards, and magistrates, their privileges were, in appearance, preserved entire; but they paid dearly in the sequel for this distinction.

*' And being apprehended therein, to keep, detain, and withhold them in sure ward, firmance, and captivity, within their respective toll-booths, and others their warding places.'*—From the letters of four forms, we learned that the King's castles were the only places for confining the subjects of the kingdom for civil debt. There were no prisons for that purpose, because the law acknowledged no execution against the body of the debtor for non-payment of money, or non-performance of contracts. That the dignified churchmen had prisons for punishment of their own irregular or criminal members, is a certain fact. No bishop's palace wanted a place of that kind; and several of their palaces, such as St Andrews, were castles equal in strength to any in the nation. Our history is full of imprisonments of people in these places; and it may justly be presumed,

med, that the prisons of the bishops, and their officials, received the debtor taken upon caption for disobedience to the church. The burghs, we see, had places of confinement so early as Robert I. by whom acts of warding within burgh were originally authorised. The word *tollbooth* plainly shows what sort of prisons our burghs, as well as those of England, were first possessed of; for *tollbooth* is an old English word used by several of their authors. The *tollbooth* was no other, than a temporary hut of boards or planks erected in fairs and markets, in which the customs or duties were collected, and where such as did not pay were of consequence confined.

*'Therein to remain, upon their proper charges and expences, until they have fulfilled and obeyed the command and charge of our letters of horning, and be orderly relaxed from the process of horning therein contained.'*—As civil rebellion was held to be such a grievous crime against the sovereign authority, so the debtor being once denounced and imprisoned, payment of the debt did not liberate him. He had been proclaimed a rebel by the King's letters, and therefore it behoved him to receive a pardon in form by other letters, termed, *'letters of relaxation,'* which also contained a warrant or charge against the keepers to give him his liberty. For being incarcerated as the King's prisoner, by virtue of a royal mandate, another order was necessary for his discharge. At the same time, it came in time to be understood, that this could not be done without the consent of the creditor. It behoved, therefore, both the King and the private party to concur in the liberation, as we find by a decision reported by Balfour\*.

*'And, for that effect, that you make stiked and locked fast houses, gates, and doors, open and patent, and use our keys thereto.'*—This part of the warrant is authorised by the barbarous statutes formerly noticed, provided for the pursuing, taking, and apprehending of rebels, and particularly of the 33d of the 2d Parliament of James VI. anno.

\* 29th July 1566, Montgomery against Semple.—Balfour, p. 561.



anno 1575, which provides, 'That it fall be leifume to ony man to follow and pursue common thieves and rebels to take them; and, gif they enter in houses, it fall be lawful to invade, break, or destroy the said houses by fire or other ways, to the intent of taking or slaying the said thieves or rebels.' Force and violence authorised by the government are, by an old and vulgar proverb, termed *King's keys*, meaning the hammers, axes, and other instruments used in force.

'*Within three days next after they be charged by you thereto, under the pain of rebellion, and putting them to our horn; with certification to them, if they faillie, our other letters will be directed, charging them thereto simpliciter.*'—The preceding command was thus to be performed in three days. The caption then, as before observed, is, in reality, nothing more than letters of horning issued against the sheriffs and magistrates, who, by that means, had three days to consider whether they were to do a piece of duty, which could not, perhaps, admit of a moment's delay. After the expiration of this space, they were to be charged by other letters upon three days more, to do the same thing, and then a new set of officers were to be charged to denounce them rebels. It may well be asked, What the principal debtor was doing all the time? for, in following out such a round-about process, the party creditor must very soon have lost sight of him altogether. The whole of this ridiculous business had truly been an innovation in our law, occasioned by a great abuse of the process of outlawry, which was only fitted for a very few particular cases, to which it always was, and continues still to be applied in England. We cannot be better convinced of this, than by comparing the unnatural, constrained terms of our present caption, with the plain, simple precept of the ancient writ, which went under the same title, directed to the sheriff, for apprehending debtors excommunicated by the church. 'Quare vobis præcipimus et mandamus quatenus dictos B. C. D. ubicunque poterint inveniri per captionem et incarcerationem corporum eorundem ad satisfaciendum  
Deo

‘ Deo et sanctae Matri Ecclesiae ita celeriter compellatis quod pro  
 ‘ vestro defectu amplius inde justam quaeremoniam non audiamus.  
 ‘ Ad quod faciendum vobis,’ &c.

‘ *And, if thir our letters be put to execution within our burgh of  
 ‘ Edinburgh, that the concurrence of the magistrates thereof be had  
 ‘ and obtained thereto.*’ This is generally supposed to have been a  
 compliment inserted in the caption by royal order. This opinion  
 is very probable ; but there was a more substantial reason for it.  
 That it is an addition made, long after the style of the caption had  
 been fixed, is evident from its inconsistency with the other parts of  
 the will of the letters, which is a warrant to charge the magistrates  
 themselves to seize the debtor, and consequently by no means agrees  
 with the order to ask their concurrence previous to the execution.  
 It is also evident, that, at the period of the insertion of this order,  
 messengers had been in practice of apprehending debtors without  
 troubling the magistrates, or even giving them any notice. The  
 city of Edinburgh was too often the scene of tumult, insurrection,  
 and disorder, occasioned by the concourse of people from all quar-  
 ters of the kingdom attending upon the King and the courts of jus-  
 tice. To strengthen the hands of the magistrates, an act was made,  
 c. 187. of the 13th Parl. of James VI. intituled, ‘ Anent tumults  
 ‘ within the city of Edinburgh, and obedience to be given to the  
 ‘ magistrates thereof.’ The statute sets forth the inconveniencies of  
 these tumults, and enacts, that no person disobey or contraveen the  
 command or charge of the provost or bailies of Edinburgh in the  
 execution of their offices, under the severe penalties specified in the  
 act. And, for enforcing their authority, the magistrates are autho-  
 rised to convocate themselves in armour, to raise men of war, and  
 to carry arms of all kinds. If they killed any person, they were  
 not to be liable for the consequences. This statute points out the  
 origin of this clause in the caption, which we find was inserted im-  
 mediately after the date of this act. No piece of business created  
 more sudden frays and tumults than that of putting captions into

execution ; and therefore messengers were expressly ordered to give the magistrates of Edinburgh previous notice, in order that they might take measures for preventing disturbances upon that occasion. By requiring the concurrence of the magistrates, it is not meant that they could refuse to give it, or that it was requisite to the legality of the execution ; it is no more than an order of expedience and compliment. In practice, however, this compliment continued to be paid until within these ten or fifteen years past. The method was this : The messenger delivered in the caption to the Council Chamber, and got it returned with a written concurrence to its execution, signed by one of the bailies. This very often created delay ; and, what was of worse consequence, the people about the office, seeing the captions lying publicly upon the table, gave notice to the debtors, who by that means escaped to sanctuary. The messengers, upon repeated instances of this inconvenience, at first complained, and afterwards ventured to omit the ceremony of concurrence, which may now be said to be in entire disuse.

Having thus analysed the style of the caption, we shall turn to the analagous writ in the law of England, viz. the *commission of rebellion* issued against parties who refuse to make appearance to the *subpoena* of the Chancellor of England. It proceeds upon the very same principles of outlawry with our horning and caption ; and from the form, it will occur, that it is, in substance, precisely the same with the caption, and that there is not much difference even in words \*.

The

\* George, &c. to A. B. C. D. E. F. and G. H. greeting : Whereas by public proclamation made on our behalf, by the sheriff of Middlesex in diverse places of that county, by virtue of our writ to him directed, A. B. hath been commanded, upon his alledgeance, personally to appear before us, in our Court of Chancery, at a certain day now past, yet he hath manifestly contemned our said command. Therefore we command you, jointly and severally, to attach, or cause the said A. B. to be attached wheresoever he shall be found within our kingdom of Great Britain, as a rebel and contemner of our laws, so as you have him, or cause him to be before us in our said Court on \_\_\_\_\_ wheresoever it shall then be, to answer

us,

The close resemblance must afford the clearest evidence, that the original process of outlawry was the very same in England as in Scotland, and that the difference of the executive writs of the two nations, at this moment, has entirely arisen from the contamination of French customs admitted into our practice during the fifteenth and sixteenth centuries, and to the very great abuse of the process of outlawry itself. The law of both countries has in this, as in many other things, rejoined in the same channel, after ages of deviation. It will be observed, that the Chancellor has been pleased to extend his commission too far; for, by the words, it should have effect over the whole kingdom of *Great Britain*. The reason is, that the King is always supposed to be actually present in Chancery; but the writs of that Court have no authority in Scotland, and, it is to be hoped, they never will. Our caption is now a warrant as simple in its nature as the *capias ad satisfaciendum*; though, in style and form, it is really a commission of rebellion. We now acknowledge no outlawry in civil matters, as it is entirely confined to crimes; and therefore the only writ which substantially agrees with the English commission is our process of fugitation against criminals who fly from justice.

The next thing we are to consider is the mode of executing this writ, which, though now looked upon as a warrant to seize the body of the debtor, is, as before observed, no more than a letter to charge the sheriffs, magistrates, and other inferior judges, to seize

S 3 2

the

‘ us, as well touching the said contempt, as also such matters as shall be then and  
 ‘ there objected against him, and farther to perform and abide such order as our said  
 ‘ Court shall make in this behalf, and hereof fail not. We also hereby strictly  
 ‘ command all and singular mayors, bailiffs, constables, and other our officers and  
 ‘ loyal servants and subjects whatsoever, as well within liberties as without, that  
 ‘ they, by all proper means, diligently aid and assist you, and every one of you, in  
 ‘ all things in the execution of the premises. In testimony whereof, we have caused  
 ‘ these our letters to be made patent Witness ourself at Westminster, this  
 day of            in the            year of our reign.

the debtor as a rebel. Before we come to the present practice in this business, let us inquire how it was originally done; and, that being well understood, the other will create very little difficulty. *Anciently*, by which word we are here to understand the three preceeding centuries, the form we have examined was literally understood and followed out. Messengers, in these times, were not able to seize or detain debtors in the places of their residence. The officer could bring no power equal to what the debtor possessed in his friends and neighbours. The voice of the law was very weak. Too little respect was paid to the persons of judges themselves, far less to men in the subaltern station of messengers. Accordingly, we find, that, though they encountered the debtor, or knew, with certainty, where he was to be found, they seldom or never attempted to lay hands upon him; but, on the contrary, charged the sheriffs of the county, or the magistrates of towns, to seize him, in terms of their warrant. If the magistrates did not obey, the next step was to take out the letters threatened against them in the certification inserted in the caption, in the following words, viz. ‘ With certification to them, ‘ if they fail, our other letters will be directed, charging them thereto ‘ *simpliciter*.’ Accordingly, our formalist, in a practical note, tells us, ‘ That a magistrate being charged, by virtue of the letters of caption, ‘ to apprehend the rebels, and refusing or delaying to give obedience, ‘ upon production of the caption and messenger’s execution, the ‘ Lords will grant simple horning, or, as some term them, letters of ‘ Second Caption.’ We have the style of this writ in the same page\*. It proceeds upon a narrative of the former horning and caption, with the messenger’s charge, against the magistrates, and subsumes in these terms: ‘ Nevertheless the said A. B. wrongfully refuses, ‘ postpones, and defers to give obedience to the said charge, without ‘ he and the remanent magistrates of the said burgh be further compelled; wherefore necessary it is to the said complainer to have ‘ these our letters direct, at his instance, against them, in manner ‘ and

\* Vide Dallas’s Styles.

‘ and to the effect after specified.’ The will of the letters, it will be observed, is no more than a second caption, but so far differing from the first, that it contains a warrant for denouncing the magistrates rebels, in case of disobedience. Mr Dallas’s next direction is in these terms : ‘ The magistrates, or any of them, (which is sufficient for the haill, being one corporation), being charged, by virtue of the foresaid letters, and not giving obedience, may, after the days of the charge are elapsed, be denounced, registrate at horn, and caption raised against them.’ Then he gives the form of this caption, which differs in nothing from a common one but in the recital of the case. These writs are retained in our chamber style-books, and may be issued at this moment, if the creditor chooses to take that method.

All our writers upon the law are agreed that letters of four forms were totally abolished, and that there is no remainder of them in our practice. These writs against the magistrates, however, form an exception to this rule ; for they are, in fact, exactly letters of four forms, awkwardly termed Letters of First and Second Caption. The warrant, in every ordinary caption, to charge the magistrates, is the *first form* ; the charge, under pain of denunciation, is the *second form* ; the denunciation itself is the *third form* ; and what has been termed the Second Caption, or warrant for imprisonment, is the *fourth*. The nature of the charge, like the original four forms, is *ad factum praestandum* ; and the space is exactly the same as these were, viz. three days each ; and hence letters of four forms may pass the Signet at any time, if magistrates shall refuse to do their duty of incarcerating a debtor, after being regularly charged to that effect.

From our old decisions, it appears, that this business of seizing and incarcerating debtors, was one of the most burdensome, and at the same time most dangerous parts of the duty of inferior judges. When the mode of their obedience did not please the creditors, the consequence always was a personal action against the magistrates.

The

The sheriffs of the counties were also, for a considerable time, in the same predicament; but, as there were no public prisons belonging to the counties, all that the sheriff could do, was to carry the rebel to the prison of the head burgh of his shire, after which he had no further concern. Thus, in a case collected by Durie, the Lords absolved a sheriff from paying a rebel's debt, whom he had taken and committed to the tollbooth of the head burgh of the shire, though the prisoner had thereafter escaped; because, after imprisonment, the sheriff *functus erat officio* \*. If the sheriff, however, had received a charge, and did not apprehend the party, he was made liable. Spottiswood has noted the case of the sheriff of Berwick, who, being pursued for a debt, because he disobeyed a charge of this kind, alleged that he had received it when he was sitting in judgment at Eymouth upon some *witches*, and he was not obliged to leave the court and obey the charge. Replied, That the rebel was sitting in court, and discoursing with him at the time. This would have subjected the sheriff, had he not offered to prove that the debtor had actually left the court before the charge was given. Durie gives us another case, where a sheriff was pursued to pay a debt for not taking a rebel, after being charged to do so, because he kept company with him diverse times thereafter. The Lords found, that the charge given should make him, the sheriff, liable for a year and day after its date, and no longer †. This year and day is a remainder of our most ancient law, founded upon a just presumption that the debtors have satisfied the debt. The distance of the sheriff's residence, and the want of prisons proper to his own jurisdiction, threw this business entirely upon the magistrates of the burghs, who, we accordingly find, were for a long period most unreasonably distressed by processes at the instance of creditors; and the more desperate the debt was, the more ready were creditors to take advantage of any circumstance in the conduct of magistrates, who were better  
marks

\* 2d March 1627, Brown against Sheriff of Wigton.

† Durie, 14th July 1630, Hay against Earl Marshall.

marks for their money. The court of justice seems, for a considerable time, to have favoured these claims, and to have subjected these public officers to very rigorous diligence in this branch of their duty. The principle was the very same which induced severity against the debtors themselves, viz. a strong desire to strengthen the hands of government, by producing strict obedience to its mandates. Thus it was found, that the magistrates of towns, charged to seize debtors under caption, are liable to pay the debts if they do not obey the first charge, and may be pursued directly, even after the debtor's death, without any previous process constituting the debt against the debtor's heirs, which was not only hard, but materially unjust \*. Nay, we find several instances where the moveables of magistrates fell under escheat in consequence of these charges; and Durie mentions an instance where a gift of that kind was found null, because the process of horning wanted the charges which we have lately described †. Lord Stair thus describes the manner of this business as it subsisted in his Lordship's own time, and would still be the rule where the interposition of magistrates might be necessary: 'Magistrates use to offer to go with messengers foot by foot, if he can show where the person taken is, of which he doth show any probable evidence; but otherwise it were unreasonable that a sheriff, or his depute, should follow a messenger, at uncertainty, to any place of his shire. Magistrates of burghs are liable to more diligence for executing captions, because of their town or jurisdiction is narrow; and therefore ordinarily the messengers do, of consent, take their officers and other assistance to search for and apprehend the party ‡.'

In proportion as the people of this country grew more populous, polished, and tractable, the voice of the law came to be better heard and obeyed. Messengers, of consequence, came to stand less in need of these extraordinary assistances in the execution of these warrants; and

\* Durie, 26th March 1634, Dunbar against Provost of Elgin.

† 16th January 1632, Drumlandrig against Cashogil.

‡ P. 748.



and very few cases have occurred in which a single officer, with one or two assistants, are not equal to the business. The disputes, therefore, between private parties and our sheriffs and magistrates are, in a great measure, vanished out of practice; and, even in Dallas's time, the method of charging the magistrates, and taking out first and second captions, had given way to action of damages. 'If the party pleases, (says Mr Dallas), he needs not be at the pains of horning and caption against magistrates, in case the prisoner was offered to them; for he may pursue them for the debt; and the rebels being offered, and they refusing or accepting, and not incarcerating, the magistrates will be liable.'

The next thing to be considered is the time in which captions may be executed. All our lawyers are agreed, that captions may be executed at any hour in the day or night, although a poinding must be done between sun and sun. The reason is, that the caption is more likely to take effect in the night than in the day, and no third party has an interest in its execution. This is not the case in poindings; because the goods attached may belong to strangers; and because, supposing them to be the property of the debtor in the warrant, the diligence of other creditors may be ready, to entitle them to a share. In the same manner, it has been repeatedly decided in the English courts, that arresting in the night is lawful. Before the Reformation, we had, like all other Roman Catholic nations, a great number of holidays; and, although Sunday was, or ought to have been, the principal day of that kind, yet we find, that, so far from being set apart as it has been since the Reformation, it was the principal day for the execution and citation of almost the whole writs of the law. As captions were issued against men not as debtors to their fellow subjects, Sunday, so far as we are able to learn, does not seem to have protected them from imprisonment. The first captions in this country, we have learned, were issued by authority of the churchmen themselves, who, of consequence, never would throw any impediment in the way of their own authority. Thence  
the

the custom had established itself. That this was the case, is proved by the Presbyterian act, c. 14. 1644\*, which they were pleased to term the third Parliament of Charles I. The keeping of Sunday in the strict letter of the Jewish law, was the banner of the Calvinists, and particularly of the Church of Scotland. The words of this act are: ‘ For the better observation of the Lord’s day, and of other  
‘ days set apart for his solemn worship, discharges all execution of  
‘ letters of caption, raised for civil debts, in any time of the Lord’s  
‘ day, or upon ordinary week days appointed for solemn fast or  
‘ thanksgiving, during the time of divine service.’ A similar statute passed in England on the 29th of Charles II. c. 7. enacting, ‘ That  
‘ no person, upon the Lord’s day, should serve or execute any writ,  
‘ process, judgment, warrant, or decree, excepting in the cases there-  
‘ in mentioned; but the service of every such writ shall be void, and  
‘ the person executing the same liable for damages, as if he had  
‘ done the same without a warrant.’ Though our Sunday act was rescinded with the other laws of the same Parliament, it has continued, in practice, to be strictly observed; for upon that day, and upon the general fasts appointed by government, no warrants of imprisonment can be legally executed. Even such debtors as have absconded or fled to sanctuary, visit their friends upon these days, and enjoy an interval of liberty.

We now come to state the different legal impediments to the execution of the caption. The first obstruction is a *protection*.—Personal execution being awarded, in Scotland, for the crime of rebellion against the King, it scarcely seemed a stretch to pardon the fault, or, by a special warrant, to protect the rebel from the consequences. Writs of this kind were familiar to the Princes of both nations, from a very ancient custom of the King taking particular societies under his special protection, in consequence of a royal warrant in their favour. To this kind the statute of the 11th Parl. of

VOL. I.

T t

James

\* Rescinded acts.

James I. c. 134. relates; and the writ itself may be found in Balfour \* These royal protections came to be inverted to private and hurtful purposes, under the title of *licences* and *supercederes*. The abuse, arisen to a great height, was endeavoured to be corrected by the 47th act of the 11th Parl. of James VI. This act was not obeyed; and, what appears a great deal worse, not only the Privy Council, but the other courts of law, ventured, contrary to the constitution of the kingdom, to assume the power of dispensing with law itself, by granting illegal protections. This appears from c. 13. of the 23d Parl. of the same Prince, which mentions; that sundry protections were sought by bankrupts, and others, to the prejudice of justice: 'Therefore discharging the Lords of Session to grant them, ' under the pain of being liable for the debt.' By posterior acts, in the reign of Charles II. the same prohibition was extended to the Privy Council, Exchequer, and Justiciary; 'Under the exception ' of protecting witnesses and others necessarily appearing before ' them; and that, if such protections should be granted, execution ' might notwithstanding legally take place.' We are informed by Sir George M'Kenzie, 'That albeit the act discharged the granting ' of protections, and makes the granters liable, yet the contemners ' of the protection are punished; and that, accordingly, a Writer to ' the Signet was suspended in November 1678 for causing apprehend a person notwithstanding of the protection of the Lords.' This Writer to the Signet certainly did honour to his profession; yet Sir George M'Kenzie, as he always does, seems inclined to defend this shameful act of power. At the same time he informs us, 'That the Council, to prevent the granting of protections, whereby ' the private interest of the subject was so much destroyed, and the ' execution of the law eluded, made an act against the practice; ' and then to elide (as he terms it) that act, they changed the name ' into licences and supercederes to persons to stay in the country, ' free of all execution, and that the King discharged this act by a ' letter

\* P. 651.

‘ letter to the Council.’ All would not do: It was too sweet a morsel of power to be parted with; and therefore protections continued to be awarded, under different modes and titles, down to the Revolution. To such a height was the abuse of these arbitrary writs arrived at that period, that the nation, with one voice, required them to be abolished. Accordingly, the claim of rights expressly declares, ‘ That the granting of personal protections is contrary to ‘ law.’ From the Revolution downwards to the act for regulating bankruptcies, the very name of *protection* was unheard of. By the last mentioned act it is revived in a legal and expedient form; and power is committed to the Court of Session to grant protections in certain circumstances to the bankrupt, upon the application, and for the benefit of his creditors.

The next circumstance is, in what places captions cannot be executed. By these we mean places of sanctuary. Asylums, sanctuaries, or places of refuge, were known and allowed among the Greeks, Jews, and Romans. The temples, the altars, the cities of refuge, and (when the Empire became Christian) the churches, afforded protection to criminals and debtors insolvent. The clergy, who set no bounds to their usurpations upon the civil authority, turned churches at last into a receptacle for the most atrocious murderers. Several of our Scottish laws regard the privilege of sanctuary, which was called *girth*, an old original word for an inclosure or defence. In the reign of James III. it required an act of Parliament \* to bring an intentional murderer out of a church to punishment; and even this could not be done until the intention, or forethought felony, was fixed upon him by a jury. The churchmen would not yield to this most reasonable statute, but defended all sorts of villains who put their trust in them. The mischiefs thereby brought upon the country occasioned the making another act, so late as the 4th Parl. of James V. which expressly declares, That spirit-

T t 2

ual

\* Viz. c. 35. of the 5th Parl. anno 1469.

ual men, masters of girths, would not deliver forethought felons to the King's officers : and therefore these spiritual men were ordered to appoint masters of girths under them, who should be personally answerable for their proper conduct. It appears by two decisions preserved by Balfour in the end of the fifteenth century, that the churchmen were in practice of excommunicating the sheriff and his officers in the execution of their offices, such as in pouding even for the King's debts ; and therefore it is declared, that the bishops, or other ecclesiastical persons, who shall do so in time coming, may be punished and corrected by the King.

The same privileges existed in England even to a higher degree. There, every church and church-yard afforded a sanctuary against legal warrants of every kind, excepting sacrilege and treason. All these overgrown abuses vanished with the religion which gave them birth, leaving no other asylum or sanctuary, either in England or Scotland, for the persons of debtors against warrants of imprisonment, but that species of protection arising from the reverence due to the presence of our Princes, which came to be extended to the places of their residence. This privilege belonged, from the highest antiquity, to the palaces of our Princes, and, in particular, to those of the Kings of England and Scotland. The word *palais* is, in France, the established term for a court of justice ; and we say the *King's palace*, the *King's court*, much in the same sense. The reason was, that the courts of justice anciently followed the King's person, and were held in his house or palace. The respect for the person of Majesty, together with the obedience and solemnity necessary in the administration of justice, concur in laying a restraint upon the behaviour of all persons attending in these places. Besides, in order to encourage the approach of the feudal vassals to do homage to the person of their Sovereign, it appears to have been a sacred rule, that their persons, upon these occasions, were under the King's special protection.

This

This necessary and proper respect for the person of the Prince, and the decorum of justice, grew naturally into a privilege, the benefit of which accrued to offenders and to civil debtors. Palaces and courts became an asylum for the time, and even continued when the courts of justice were separated from the King's residence. The difference was, that, in the former, it subsisted only during the sittings of the court; whereas, in the latter, the effect was constant. It is therefore an axiom in the law of England coeval with the power of execution itself, that no arrest can be made in the King's presence, nor within the verge of his royal palace, nor in any place where the King's justices actually sit, or where his royal person resides. In Henry VIII.'s time, the confines of his palace included a great part of the city of London; but, by a statute in the 28th year of his reign, it was limited in point of extent. So strongly was this idea of the privilege annexed to the King's residence impressed upon the minds of the people, that a number of lanes and alleys in and around the metropolis were in a manner taken possession of by a set of desperate people, who, under pretence of the privilege of these places, as being formerly the sites of royal houses, joined in a kind of defensive covenant to protect themselves against arrests, and the process of courts. The ordinary police was unable to root them out, because the people looked upon it as an attack upon their privileges; and therefore it required no less than three or four acts of Parliament, in the reigns of William, Anne, and George I. to clear the metropolis of these seminaries of idleness, disorder, and mischief. A few years ago, upon a motion of the Judges, said to have come from Lord Mansfield, the privilege of the verge of court was abolished; so that debtors have no asylum in England, though still arrestments cannot be executed within the palaces, and the courts of justice, whereby the original purpose of preserving peace and respect in these places is answered, and the abuse completely restrained.

In Scotland, all the causes above mentioned concurred in bestowing the privilege of an asylum upon the Palace of Holyroodhouse.

It

It was originally an abbey, erected by a charter from David I. in the year 1128. James V. erected a house near the Abbey to live in, as a change from the Castle. Mary, his daughter, and James VI. resided principally at Holyroodhouse; so that it had a double title to the privilege of affording an asylum to debtors and to lesser criminals; but, as it possessed that quality as an abbey, in the first place, so it continues, to this day, to be termed the *sanctuary*, which, like the old word *girth*, is proper to denote the protection afforded by a church. Upon the accession of James VI. to the throne of England, so fond were we of the least memorial of royalty, that Holyroodhouse continued, by consent of the nation, in full possession of its privilege as a sanctuary for civil debts. The Duke of Hamilton, hereditary keeper, or, in the language of the former times, *master of the girth*, the only one now in Britain, appoints a bailie under him. This officer has a jurisdiction within the limits of the place, which extends from the Abbey Strand, and comprehends Arthur's Seat, with the whole grounds and houses within the wall. A record is kept by the deputy, in which debtors who intend to take the benefit of the protection, are immediately entered by name and designation; and therefore the first thing the debtor does, is to have himself *booked*, as it is termed. The Lords lately found, that no person is entitled to the benefit of this sanctuary, after twenty-four hours residence in it, unless his name be so recorded; and this decision is founded upon common sense and expediency; for, in many cases, the fact, of debtors flying to the Abbey, is of the utmost consequence in determining questions; and an extract from this register is the ready and distinct evidence of the fact. It is therefore unreasonable that any man should pretend to take the benefit of sanctuary, without affording to his creditors the legal evidence of his being there, or that the creditors should be loaded with the truth of so material a fact. The Abbey, however, will afford no asylum to obstinate or fraudulent debtors; and, where this is known or suspected, the Court of Session, upon application of the creditors, will grant a

warrant

warrant to bring the debtor before them, and commit him to prison, or restore him to the privilege, as his conduct may deserve.

The same prejudices existed among the people of this country as among those of England; they were inclined to hold the privileges of sanctuary to be annexed to all the ancient residences of our Princes, and particularly to the Castle of Edinburgh, and to the Mint. The last had never been a royal dwelling; but, as the general notions of the vulgar are seldom or never without some foundation, it is, with great probability, supposed that the King's servants in that place were anciently protected during the time of their employment in the service of the public. The privilege of sanctuary, however, has long been denied to the Mint. With regard to the Castle, the point was determined in the case of *Belsches contra Kinloch*, 4th July 1751, when the Lords, with great propriety, found that the Governour of the Castle was bound to grant access to messengers at arms, or other officers having the King's letters, in order to their putting the same into execution.

If our neighbouring country has abolished the privileges of sanctuary, it has preserved an asylum of a different kind, common to every subject in the nation, where he may be safe, if he pleases, against all arrests, and that is his *own dwelling house*. This was the law of Rome, and it was the ancient law of the whole island: 'Domus sua cuique tutissimum refugium est et receptaculum.' The English writers seem to be proud of borrowing the very expressions of the civilians upon this point. A man's house is, with them, his castle of defence, an asylum wherein he should suffer no violence. In England, many cases have occurred, where bailiffs have lost their lives in endeavouring to force open the house of debtors to make arrests; and the general opinion given and adhered to by the judges was, 'That the bailiff was slain in doing an unlawful act, as he ought not to have broke open the house; for, under pretence of such authority, any one might enter; and every one is to defend his



‘ his own house \*.’ At the same time it has been decreed, ‘ That, if a window be open, and a bailiff touches a person’s hand, either as he puts it out of the window, or the bailiff puts in his hand and touches him, he having a warrant to take him, he is then his prisoner, and he may justly break open the house to take him away.’ From the history of the execution against the persons of debtors in Scotland, the reason of the very remarkable difference in our law and practice will be perceived. Here a man’s house is no asylum. Messengers may enter it in consequence of their warrant, and break every door and every keeping capable of concealing the master. We have heard the barbarous acts of Parliament which authorised this violence. The debtor and his house are thus treated not because he is a debtor, but because he is a rebel and a criminal. That our ancient law knew no such violation of the rights of mankind, could be proved by undeniable arguments drawn from a variety of our primitive customs. Let one suffice. The houses of debtors in this country cannot, at this moment, be entered by an officer to execute a poinding. Before letters of horning came to be granted for liquid debts, letters of poinding and apprising were the only warrants of execution; but, if the debtor shut his doors, the officer had no authority to enter his house. After hornings became the general and established writs of execution, officers, knowing how the law stood, were careful to be provided with a caption; and then, under pretence of searching for the rebel, they forced the doors open, and poinded the houses. *Letters of open doors* were next invented; but, like many other letters contrived about the same time, were contrary to law. A man’s house ought to be the castle of a North, as well as of a South Briton. The law of our country has been defeated, first by the monstrous abuse which arose in the beginning of the seventeenth century, of applying the process of outlawry to the case of civil debts, and by a trick of practice, where the

\* Law of arrests, p. 72.

the goods within the house, and not the man himself, were intended to be taken in execution. But no house ought to protect a subject who, by the commission of a crime, has forfeited the right of a citizen; and therefore it is laid down in the laws of England, that the breaking open the doors of a house where an offender is sheltered, may be justified in several instances. 'First, On a *capias*, grounded upon an indictment for any crime whatsoever. Secondly, Upon a *capias* from the King's Bench or Chancery, to compel a man to find sureties for the peace or good behaviour, or upon a warrant from a justice of the peace for that purpose. Thirdly, Upon a *capias utlagatum*, or *capias pro fine*, in any action.' Thus, though we hold a debtor to be guilty of no crime, and though our caption is, at present, no more than a simple warrant, yet have the houses of the people of Scotland lost the sacred privilege of protecting the masters of them; because, by the force of a word, and antiquated form, debtors, it seems, are still outlaws, and a caption is a *capias utlagatum*. Thus one abuse is grown out of another; and, though the original error is no more, the consequences of it continue to be a reproach upon the law and practice of this country.

In England, nine-tenths of common debts and claims are made up, and the ruin of many families prevented, by the protection which is afforded to their persons in their own houses; and hundreds have retired to our sanctuary and settled their affairs, which otherwise could never have been done. Till such time, then, as our law returns to its ancient channel, it is right that there should be a public sanctuary in the kingdom.

The next step to be considered is the ceremony of *apprehending* and *incarcerating*, which we shall take from a book called the *Office of a Messenger* \*, every word of which, the forms excepted, is copied from Lord Stair, with a very few practical alterations: 'First,

VOL. I.

U u

' then,

\* P. 231.

‘ then, the messenger must fix and display his blazon on his breast, so as the impression of the arms may be seen, that thereby his authority and warrant may appear. If any affront be done him in the exercise of any part of his office, when he wants his blazon it will not import a deforcement, unless the actor knew him to be a messenger.’ When the rebel is found, the officer touches him with his rod or wand, reads to him the letters of caption, and gives him a signed copy ; ‘ yet, if he have witnesses and assistants sufficient to make him go to prison, if he were unwilling, the not reading of the letters, or the not giving a copy, signed by the messenger, would not annul the caption. If the party taken should escape, the reading of the letters, and giving a copy, would not have the same effects as if the blazon were seen, and the party touched with the rod, these being evidences of the messenger’s authority which the party cannot deny, but that he knew him to be a messenger at arms, and thereby might not only be liable to the penalty of deforcement, but to the other penalties of his contempt and violence.’

This *blazon* the messenger is obliged to display upon his breast, in order that the party may not pretend ignorance of his office and authority. If he omits to do this, the debtor, it is said in our law-books, may resist, and refuse to be taken. The private personal knowledge, however, of the debtor, has been held equivalent, which does not appear to have been well decided ; because, where ensigns of office are given, it is to these that respect is due, and not to the person of the officer. Messengers found by experience, that the wand (which anciently was three quarters of a yard long) was too conspicuous for the convenient execution of their office ; and therefore they converted it into an ebony baton six inches long, tipped with silver. The rod and the blazon are delivered to them by the Lyon at their admission. Formerly, as a signal of deforcement, they broke their long rod in two pieces ; but, as it was not convenient to break the modern elegant machine, they contrived

contrived an emblem of an emblem. They put a ring upon their little baton, and now mark a deforcement by sliding this ring from the one end to the other. It is the touch of this wand which deprives the debtor of his liberty, and constitutes him a prisoner. Various are the effects of this touch. The messenger tells the debtor, at the same time, in the King's name, that he is a prisoner; after which, though he should get off either by force or stratagem, the officer may follow and bring him back, even out of the sanctuary of Holyroodhouse. Formerly, it was supposed that the execution of the caption was not complete until the debtor was actually committed to prison; and it followed of consequence, that a fist upon a suspension delivered him out of the hands of the officer. By several decisions, however, within these twenty years, founded apparently upon English ideas, the debtor is held to be in prison from the moment he is in the custody of the messenger; and, therefore, though a fist be presented, that officer is not obliged to take any notice of it. These decisions have gone upon a right principle; for a debtor in the custody of a messenger is completely deprived of liberty; and consequently the diligence has received full execution before the fist arrives.

The essential part of the form, both in England and Scotland, is the corporal touch of the body of the debtor; for, after this is done, it is time enough for the officer to show and read his warrant, if required. This point is completely established in England. In a case where the bailiff had not laid his hands on the defendant, but only showed his warrant, and pronounced the word '*arrest*,' it was found that there had been no seizure, or, as they term it, no *legal arrest*. But it was agreed, that, if he had but touched the defendant even with the end of his finger, it would have been an arrest; and he might have broke the house to seize upon him had he escaped into one, in the same manner as a bailiff who has a warrant against a person who is in a house, and lays his hand upon him through the window, may break the house to come to him.

A similar question occurred, a very few years ago, in a political dispute in this country. When the Town-Council of Edinburgh were met for the purpose of electing a member to represent them in Parliament, and were proceeding to business, a messenger appeared, and demanded liberty to seize the person of one of the members, in consequence of a caption he had against him. The messenger, however, was in the outside of the bar of the Council Chamber, and orders were privately given to keep it close. The officer did not attempt to get over the bar, but made a noise, showed his baton, his blazon, and his caption, and declared that the person named in the diligence was his prisoner. In the mean time a writ on a suspension was procured against the proper creditor, and intimated to the messenger. The point afterwards came before two Judges of the Court of Session, to whom it was stated, that the messenger never had touched the person of the individual in question, nor had obeyed the will of the caption, by forcing open gates and doors, and using the King's keys thereto, but had merely contented himself with looking at him, which never could amount to an actual arrest or seizure. The Judges accordingly found so, and suspended the diligence.

The bailiffs in England carry no blazons, or other insignia of office. Their whole art lies in concealing, disguising themselves, and executing their writs with address. For this purpose they generally go in masques, study to personate all characters; and he who is the best actor is the best officer. The bailiff is obliged to detain persons arrested twenty-four hours in a private house before lodging them in prison, on purpose that they may find bail, or agree with their adversaries. Several acts have been made for preventing the extortion of officers upon these occasions; and they are discharged from carrying them to any public-house but by their own consent. The statutes, however, have not proved of very great use; the bailiffs keep public-houses; and, as the benevolent Mr Howard observes, when the bailiff himself keeps a public-house, it  
seems

seems to preclude the debtor's choice ; he must either go to that house, or directly to prison, after the twenty-four hours. From the noted extortion of these places, they are termed *spunging-houses* ; and there debtors are allowed to live as long as they have money. But, although the expence be great, it cannot be denied, that this delay of going to prison is often a matter of convenience to debtors ; for many matters are, by that opportunity, often made up without being made known to the world ; whereas, when a man goes to prison, his affairs are made desperate at once. In this country, the practice formerly was to carry the debtor directly to goal ; and it is the case in all places where the magistrates are charged, or their assistance demanded. The personal danger, from the repeated decisions of the courts, has taught them not to give a moment's delay. But in this and other large towns, where messengers act by themselves, their method is to carry the debtor to a public-house ; and, from an idea of the English practice which has got among them, they sometimes venture to keep the debtor in their custody twenty-four hours ; but, in general, if the caption be executed any time in the day, the delay is no longer than ten or eleven o'clock at night. It were to be wished that our messengers could contrive something to have the good effects of the English *spunging-houses* ; some purgatory or middle state, to last for a few days, in place of carrying their prisoners at once to a dungeon.

The bailiffs in England are not allowed to take any thing from debtors for the arrest, but what they freely give, or what shall be determined by a justice of peace ; but, in reality, very large fees are extorted upon these occasions, according to the circumstances and situation of the debtor.

Upon a complaint against one of our messengers for malversation in the year 1738, the Lords found, ' That all messengers ought to be ' paid of their fees and expences for executing letters of horning and ' caption by the creditor-employer, and not by exaction from the ' debtor ;

‘ debtor ; and that any messenger claiming, exacting, or taking from  
 ‘ any person or persons under diligence, by horning or caption, any  
 ‘ sum or sums of money, or security for the same, under colour of  
 ‘ fees, or expence of going or coming to or from any place or places  
 ‘ towards, or in order to the execution of such diligences, is un-  
 ‘ warrantable, illegal, and oppressive, and opens a door to high and  
 ‘ grievous exactions from ignorant, distressed, and indulgent per-  
 ‘ sons.’ The Lord Lyon issued injunctions to the messengers,  
 after advising with the Lords. The 14th article ordains, ‘ That  
 ‘ no messenger, in executing diligence of any kind, shall exact,  
 ‘ take, or receive, on his own account, from the person against  
 ‘ whom such diligence is executed, or meant to be executed, any  
 ‘ sum whatsoever, under any name or pretence whatsoever, as he  
 ‘ shall be answerable in any court competent.’

In London, the bailiff must carry his prisoner to the prison of that court from whence the writ issues. With us, the messenger has, by practice, the choice of the prison, if there be two at any equal distance ; but he will be punished for oppression if he forces the debtor to go further off. The established rule is, that the debtor is to be carried to the prison of the jurisdiction where he is apprehended, unless he desires to be carried to another. Thus people of any station, taken in Edinburgh, generally request to go to the Canon-gate, because the accommodation is greatly better than that of Edinburgh prison, which is an abominable dungeon, dark, cold, and unwholesome. There is no public improvement so much wanted as a public prison, where the unfortunate might suffer the loss of liberty without endangering their lives by that slow, and therefore cruel torture, which the law-books of Scotland term *squalor carceris*.

When the messenger brings his prisoner to the goal, he produces the caption to the clerk as the warrant for receiving him ; and the clerk enters upon his register the name of the prisoner, the ground of debt, and the amount of the sum for which he is committed.

mitted. The booking-money is then paid, which, by act of Council in July 1728, is a halfpenny Sterling for each pound Scots, or sixpence per pound Sterling, which goes to the keeper of the prison. The captain is answerable to the magistrates for every damage suffered by his neglect; and, as the magistrates are liable in the first place, it was absolutely necessary that they should know the extent of their obligation. Hence arose the necessity of prison registers, and the exaction of booking-money, as a perquisite to the keeper. It is a custom universal in our burghs, and it is reasonable, that the goalers should have some certain advantage for their risk and trouble. From our decisions, however, it appears that very few towns in Scotland kept goal records before the beginning of the present century; but now, unless the booking-money be paid, and the debtor entered, the magistrates and keepers are not obliged to receive the prisoner. At the same time, the Lords found, that it was not the business of the messenger, but of the keeper, to see it done. The effect of booking is, that the magistrates, in case of an escape, are liable for no more than the debt specified, although it be far below the sum mentioned in the caption; and, for this good reason, that, by such entry, the imprisonment is restricted to that sum. This has, in several instances, been serviceable to magistrates in actions for escape; because, purposely to diminish the goal fees, creditors booked their prisoners for very small sums; and they were, at that time, safe to do so, because the debtor could not be liberated without obtaining letters, and giving the magistrates a charge to set him at liberty. These letters, by the form, could not be obtained without intimation to the creditor, who instantly arrested the debtor for the remainder of the debt. When we come to the more agreeable business of liberation of the debtor, we shall give the reasons how this device came to be rendered of no avail. At present, it is sufficient to mention, that the Lords found, that arrestment was only a continuation of imprisonment: Therefore the booking-money must be paid upon arresting, as well as incarcerating; and the magistrates  
are



are at liberty to discharge the party, upon payment of the booking-money. In in this most disagreeable part of practice, it is now a fixed rule that a debtor must be booked for a sum no less than that for which the creditor is content to liberate him ; because, upon consignation of that sum, he may gain his liberty at any time.

When a man is in prison, it is common for his other creditors to arrest him in it. The form is this : The messenger goes to the keeper of the goal, produces the new caption, and charges him, in virtue thereof, to detain the prisoner until the debt be paid. Formerly, the officer touched the prisoner with his rod, and charged him to remain in prison till the debt upon which the caption proceeded should be paid. At present, he only leaves the principal caption with the goaler, and returns a certificate of the *res gesta*, or execution, subscribed by himself and two witnesses. This method of arrestment is the only one in which a second caption can be executed against the debtor, already in prison ; and it has the effect of affording action against the town, in case of an escape ; because the goal keeper is the deputy of the magistrates. When captions are granted against more debtors than one, who live in different places, if the messenger be not provided with captions against each of them, he must, at least, produce the principal letters to the goaler, and leave a full copy of them in his hands, with an attestation of its being a true copy, duly subscribed. It is a capital part of the liberty of the subject in this kingdom, that no man can be incarcerated without a legal warrant ; and that the keeper of the prison where he is confined shall be possessed of that warrant, or a double of it, properly authenticated, otherwise the party cannot be detained in prison ; and therefore every debtor is entitled to call for a copy from the keeper, in order to know the cause of his confinement, and to take measures for his liberation.

When a creditor or a messenger has further use for the principal letters of caption lodged with the goaler, one or other of them must  
grant

grant a receipt, containing an obligation to make them forthcoming when demanded. This is done in order to protect the keeper of the prison, and his constituents the magistrates of the town, from any future action that may be brought for wrongous imprisonment.

In the last century, when a debtor was incarcerated at the instance of one creditor, and another, whose diligence was not ready, had reason to suspect that he would settle with the creditor incarcerator, he applied for a remedy, now utterly and justly out of practice. It was termed *letters of summar arrestment*, and is certainly to be classed among those letters which the Writers to the Signet, without regard to the law of the country, thought proper to shape to the particular exigencies of the case of the employer. These deduced the ground of debt, and narrated, that the debtor, as the complainer was informed, being incarcerated at the instance of the other creditors, intended privately to obtain himself liberated, and to depart the kingdom, before such time as the complainer could, by course of law, obtain other letters of caption against him; and therefore bears warrant to messengers to fence and arrest him in prison, therein to remain until payment of the debt, or finding sufficient security. It is true, that these letters have now vanished out of practice; but it will, no doubt, occur, that they left behind them a progeny as mischievous as themselves, we mean, our present warrant upon alledgeance *de meditatione fugae*; though, no doubt, a warrant of that kind may be applied for even against a man in prison; and, in that case, it answers the very same purpose as these antiquated letters of summar arrestment. The difference is, that the one passed of course, and the other requires an oath of credulity upon the part of the creditor.

---

### *Liberation.*

**T**HE will of the caption bears, that the debtor was to remain in prison 'ay and while he fulfil and obey the command and ' charge of our other letters of horning, and be orderly relaxed ' from the process therein contained.' We formerly noticed, that it was not sufficient that the debt should be paid, and a discharge granted by the creditor. It behoved the party also to be *discharged* by the King. The form was, to obtain letters of relaxation and liberation, upon a bill to the Lords, with which the Writer produced the discharge of the debt, and a receipt for the composition of the single escheat; and hence the clause in all the old discharges, which we find in our formalist, ' Consenting that the principal and ' cautioner be relaxed from the horn, whereunto they are denoun- ' ced, by way of suspension or otherwise, as accords, and that with- ' out caution or consignation.' These letters were exceedingly expensive, and bore very hard upon poor people, who being unable to procure them, were sometimes oblig'd to remain in prison upon that account, after their debts were paid. The keepers of the prisons, in general, ventured to dispense with this form. The keeper of the Edinburgh tollbooth, however, stood more upon punctilio, which produced an act of Sederunt \*, allowing debtors to get out of prison, without a charge to set at liberty, if the debt did not exceed 200 merks, whereby a very mean and partial relief was afforded. In order to save the booking money, and at the same time, to avoid the consequences of this act, creditors entered the prisoners for ten or  
twelve

\* February 5. 1675.

twelve merks more than the two hundred, and then arrested for the remainder of the debt ; but the magistrates of Edinburgh having humanely ventured to liberate the prisoner in these cases, *without a charge* to set at liberty, the Lords, by a solemn decision \*, found them only liable for the restricted sum entered in the prison-books ; and, as they could, in no event, be subjected for any more, letters of liberation went entirely *into disuse*. What contributed to this alteration of practice, was the odium under which escheats upon civil rebellion fell, after the Revolution. The general sentiments of the nation altered in consequence of the claim of right ;—civil liberty, and gentler manners, taught men to hold that scandalous forfeiture in just detestation ;—the Exchequer no more demanded compositions for escheats ;—and the Keeper of the Signet made no complaint against the magistrates for dispensing with the letters of liberation. Another circumstance had paved the way to this improvement : Creditors sometimes consented to the temporary liberation of prisoners, without discharging the debt ; and magistrates had been accustomed to set people at liberty upon these consents. Nothing is more instructive in the history of our business than the progressive forms themselves. This deed recites, That whereas D. is incarcerated, at my instance, in such a prison, for not payment making of such sums, conform to a caption ; and I being willing to allow him *some liberty* to go about his affairs, that he may be the better enabled to pay his debts ; therefore consents that he be forthwith liberated, in so far as concerns any execution, at my instance, against him, and that without necessity of *any suspension, relaxation, or charge to set at liberty*, whereanent this shall be a sufficient warrant to the magistrates and keepers of the tollbooth ; and, in case suspension, relaxation, and charge to set at liberty, be found necessary, in that case I consent to the passing thereof without *caution or consignment* ; providing that he crave no suspension of the debt, but only of the letters.

X x 2

\* 11th November 1704, Blair against the Town of Edinburgh..

ters of caption ; or, at least, that he use the same no further, but for his present liberty, and but prejudice to me to put the letters in execution against him whenever I shall think fit, notwithstanding of the said consent or suspension, &c. upon which conditions only the consent is granted and accepted, and no otherways."

This form points out the nature of this business in the end of last century. At present, the ceremony is wonderfully lessened. Upon lodging a discharge or extract with the clerk of the prison, the debtor is immediately let at liberty. To save, however, either the expence of an extract, or the inconvenience of leaving the discharge, the creditor writes a consent to the *liberation* in the prison books, opposite to the entry ; and, for the most part, the keeper is contented with a holograph letter, consenting to the liberation of the debtor ; but this letter must be sent by a messenger, or other person known to the clerk of the prison, who makes that person give an attestation on the foot, that the letter is genuine, and of the hand-writing of the creditor ; and this he considers as a sufficient warrant.

## ACT OF GRACE.

The will of the caption also bears, that the debtor is to remain in prison upon his own proper charges and expences. This clause was inserted at that period of our law when caption proceeded upon letters of *four forms* ; when, after imprisonment of his body, no further execution could go out against his effects ; and therefore he is ordered to remain upon *his own expences*. Thus the letters of four forms themselves bear, that, if the debtor surrendered himself to ward within the King's castle therein mentioned, he was to remain there upon *his own proper charges and expences* ; otherwise, as a prisoner of state, he would have been entitled to support.

Here

Herē is a circumstance worthy of observation. Our old law did not allow execution against both the debtor and the goods at once ; it presumed the debtor to be in possession of effects, and therefore made no provision for his subsistence in prison \*. The creditor might seize his property ; but, if he did, it behoved his person to be set at liberty. When the law and the principles of incarceration altered, no provision was made for the unhappy individual, nor no inquiry set on foot, whether he had any fund of subsistence or not ; so that, from the humane principle of our ancient law, arose the bitterest circumstance in the situation of debtors. To the very close of the sixteenth century, we find not a hint given of the least relief afforded to the most innocent inhabitants of a goal, the prisoners for civil debt, though the justices of peace, in the reigns of James VI. and Charles II. were entitled to tax the counties for the support of indigent criminals. Debtors, it seems, were all this time entirely thrown upon the charity of the burghs, a circumstance which does no honour either to the manners or police of the nation.

At last, this unfortunate set of men grew so numerous, that the burghs were unable to keep them in life. They complained in a body to Parliament, which produced the famous act 1696, ' anent ' the alimēt of poor prisoners.' This act proceeds not upon consideration of the sufferings of the wretched people described in it, but was intended merely to alleviate the expences of the burghs charged with their maintenance. Besides answering that little purpose, it has served the more noble end of relieving thousands from misery ; of removing, in a great degree, the evils of imprisonment of the inferior and useful class of people for small debts, and thence justly deserved the title of the ACT OF GRACE.

The first question which occurred upon this act was, Whether intimation to a factor for an English merchant should be held to be equal

\* Except in the case of debtors to merchants, by the act of Robert Bruce, if the party had no goods, the merchant was obliged to find him in bread and water until the debt should be paid out of his lands.—Stat. 2. Robert I. c. 19.

equal to intimation to the creditor himself. The Lords, with great propriety, thought the factor, who had power to put him in, had likewise power to take him out; and therefore sustained the intimation as sufficient. This was extremely right; but, in the same case, they were pleased to find, that, as the act had been intended as a favour to the royal burghs, and not to the debtor, magistrates had a discretionary power to detain the prisoner, if they thought proper. They further found, that the act was correctory, unfavourable, and nowise to be extended; and, therefore, that, in case magistrates modified too large an aliment, it might be restricted by the Lords themselves. ‘All knew (says Fountainhall) that there was a mistake in the act, which should have fixed a *maximum*, beyond which magistrates should not go, as well as it had made threepence the *minimum*; and it was observed, that, since this act, bankrupts sought no more the benefit of *cessio bonorum*, by persuading magistrates to modify a greater sum than creditors could comply with.’ Another question occurred, Whether the debtor should be obliged to grant a disposition *omnium bonorum*. As the act was silent upon that article, the Lords left it to the magistrates to require it if they thought fit; only, it is to be observed, that in Edinburgh they always exact such a disposition before liberating the prisoner\*. In a few years afterwards, however, the sentiments of the Court altered. They found, that the magistrates had not a discretionary power to liberate or detain a prisoner as they thought proper, and that it behoved them either to aliment the prisoner themselves, or let him go free†.

If a creditor be able to condescend upon any fund possessed by the prisoner, the benefit of this act will be refused. Thus a debtor, who stood upon the charity of the Exchequer for fifteen pounds *per annum*, was found not to be entitled to any other aliment‡. The only

\* December 28. 1710, Durham against Glaswell.

† February 20. 1713, Grierison against Magistrates of Dumfries.—Forbes.

‡ July 24. 1734, M'Kenzie against Blair.

only other question of importance is, Whether a prisoner set at liberty upon this *act of grace*, can be again incarcerated upon the same diligence. The Lords have varied in their determination of this point. A debtor liberated from Edinburgh tollbooth was again incarcerated upon the same caption in the Canongate goal. The debtor complained to the Lords; and they most justly found, that the imprisonment was unwarrantable; that the debtor could not again be incarcerated by virtue of the same caption, but *causa cognita*, by warrant of the Lords, who considered the liberation equivalent to a suspension and relaxation\*. In the same spirit, the Lords again found, that a debtor being once incarcerated for a debt, and liberated upon the act of grace, the magistrates of a burgh may refuse to incarcerate him again for the same debt, although the creditor offered to aliment him†. In a later case, the Lords were pleased to reverse these decisions of their predecessors, and to find a creditor at liberty to execute his caption a second time. On this occasion, it was observed, ‘That, although a liberation on the act 1696  
 ‘ does not legally discharge the diligence, or restrain the creditor  
 ‘ from again putting it in execution; yet, if he commit a moral  
 ‘ wrong, by using that diligence in an oppressive manner, he is censurable in equity, and the debtor may obtain relief by suspension‡.’ This decision is quoted by Mr Erskine as an authority for a second imprisonment, and as the present rule in this business. The justice of the decision may, however, be questioned. The act of Parliament gives no authority for a second imprisonment; and, though it may be true that the debt and diligence is not discharged, yet the Lords themselves, according to the decision 1709, ought to be judges of the change of circumstances. It is their warrant alone which ought to authorise a second imprisonment.

Were

\* Forbes, December 10. 1709, Law against White.

† July 8 1724, Boyle against the Magistrates of Forres.

‡ June 19. 1759, Abercromby against Brodie.



Were the point to be again tried, the Court would, no doubt, return to the solid opinion of their predecessors.

It is not our intention to enter into the form of procedure used in applying for the benefit of the act of grace. The whole may be found in Boyd's Judicial Proceedings, to which we here beg leave to refer. The observations we have to add are, that the intimation made to all the creditors is meant to have the same effect as against the creditor-incarcerator, founded upon a special decision of the Court, where they, with great propriety, found, that if, after intimation to the creditor incarcerator, the debtor be arrested by another creditor during the running of the ten days, or after elapse thereof, there is no necessity for a new intimation to him; but, in terms of the penult clause of the act, he must find instant security to aliment, otherwise the prisoner may be set at liberty\*.

It is certain, that poor prisoners in England were entirely thrown upon the county allowance, which differs in every place, and upon the charity of the public, till the 32d year of George II. when a statute was made for regulating and improving prisons; whereby it is enacted, that, upon the debtor's making oath that he has no funds for immediate subsistence, the creditor should be obliged to pay him *a groat* a day, or two and sixpence a week. Had this act of Parliament copied the simplicity of our act of grace, it would have proved a happy relief to hundreds of miserable people; but the difficulty of obtaining it is so great, that Mr Howard tells us, that, in Middlesex and Surry, he had not found twelve debtors who had been able to make it effectual. This is a strange contrast. Our act 1696 was not intended for the relief of debtors, and yet it proved the most gracious law which they have received in any country of Europe. The act of George II. was expressly intended for the relief of prisoners, and yet it has done them little or no good. It may be said, that, in England, there is no act of grace, and

\* 27th January 1736, Dowie against Crocket.

and the law never admitted the Roman *cessio bonorum*. In such a populous and commercial kingdom, imprisonment must be attended with terror and uncertainty. Insolvent acts, therefore, pass at different periods for liberating all debtors under the descriptions there given, and who have suffered confinement for any length of time. This relief is uncertain ; but, when it arrives, it is more complete than our *cessio*. The debtor makes a surrender of the same kind, upon oath, in favour of his creditors, and comes out a free man.

### BOND OF PRESENTATION.

It is now proposed to treat of those practical cases which are frequently consequent upon personal diligence, viz. the *bond of presentation*,—the *bill of suspension*,—and the *suspension and liberation*.—The two first are the modes of preventing the actual imprisonment of the debtor, and the suspension and liberation sets him at liberty after the incarceration has taken place.

When a debtor is in the hands of a messenger, he sometimes applies to be allowed a time certain to raise money, and regulate his affairs. The creditor, and often the messenger himself, agrees to this, conditionally that the debtor find sufficient bail to present himself, in order to the complete execution of the diligence, upon the day, hour, and place agreed upon. Bail of this kind is easily found by debtors of any character and credit, because it is in their power to perform. They may afterwards, indeed, not be able to pay, but they have it in their power to present their persons, agreeably to the agreement, for the cautioner's relief; and the failure of a debtor, in such a case, is reckoned one of the most dishonourable acts that can be committed in the business of civil life. The deed executed upon this occasion is termed a *bond of presentation*. We shall take the common form of it from Spottiswood. After the preamble, it proceeds thus:

' Therefore wit ye me to be bound and obliged to present the per-  
 VOL. I. Y y son

‘ son of the said B. to the said C. or to any having his commission,  
 ‘ at Edinburgh, in the house of                      upon the 15th day of Sep-  
 ‘ tember next to come, between the hours of ten and eleven fore-  
 ‘ noon, without any longer delay, fraud, or guile.’

There is here a necessity for precision in *time* and *place*. The creditor, or his messenger, commonly gives punctual attendance ; but, though they should not, the cautioner and the debtor must be punctual ; and, in order to prove it, an instrument must be taken after the same manner as is done in using an order of redemption\*. There was a clause in the old bonds of this kind, that, in place of appearing at a private house, or making any appointment upon the head, he the debtor should, against a day certain, enter his body in a prison specified, and book himself in common form. In cases of this kind, the cautioner borrows the caption from the creditor, or, at least, provides himself with an extract of it from the Signet, otherwise the keeper of the prison will not receive the debtor. In some cases reported by Lord Stair, and mentioned in the Dictionary, the Lords allowed the cautioner a new day to present, where the delay had been moderate, and the excuse plausible ; but these decisions are not to be depended upon.

‘ Then and there to be personally apprehended and disposed of at  
 ‘ the will or pleasure of the said C. or any having his commission,  
 ‘ conform to the said letters of caption in all points, without any  
 ‘ suspension, protection, *cessio bonorum*, or other ground or warrant  
 ‘ whatsoever, that may stop, hinder, or impede the said B. appre-  
 ‘ hending the said C. and incarcerating of him; and putting the said  
 ‘ letters of caption to their full and final execution in all points.’

By the word *protection*, we see at once that this style is not the production of the present century. As the word *protection*, however, is a general term, and understood in a different sense from what it formerly was, it may not be improper to retain it in the style of  
 the

\* 22d November 1695, Pitlado against Main.

the presentation. It is from this last clause that the danger of the cautioner in a bond of this kind arises. The intermediate execution of another caption, the imprisonment for a crime, or any other accident which may arise from the fault of the debtor or cautioner, or their neglect, will forfeit the bond. Thus a cautioner presented his party at the day and place appointed; but, when the messenger attempted to do his duty, the debtor produced an attest of his being enlisted as a dragoon, which, by act of Parliament, secured him against the diligence. The Lords, therefore, found the cautioner liable\*. In the same manner, a cautioner was subjected where the principal had, *medio tempore*, been taken upon another caption; and in vain he pled that the presentment had thereby become *factum impreffabile*. In this last case, it was admitted, that sickness, or any accident not occurring by the prisoner's fault, might have been relevant, if the party had been offered so soon as that accident ceased; but it cannot be extended to any impediment by the prisoner, or his cautioner's fault or fact, such as to be under the hazard of other captions; for, if that had been expressed, as it is pretended to be implied, no man of sense would have dismissed a prisoner in these terms, that he should be produced such a day, if he were not taken by other captions for his own debt. 'The Lords repelled the reason simply, albeit the prisoner had been offered immediately after he was free of the other caption†.'

'And that under the penalty of Scots money, besides performance.'—This is by much too general, and throws the import of the obligation entirely into the power of the Court, who may ascertain the damages or penalty in any manner they please. The proper penalty, in this case, is the payment of the debt; and it should be conceived not as a penalty, but as an alternative, which, of consequence, will receive a stricter interpretation in favour of the creditor. For the creditor's benefit, therefore, the alternative should

Y y 2

be,

\* 27th July 1710, Henderson against Graham.

† Stair, 7th July 1681, Polstead against Scot.

be, and is now generally expressed in this manner: ‘ Or other-  
 ‘ wife, in case I happen to fail in performance of the premises,  
 ‘ or any part thereof, or that it shall be my pleasure not to present  
 ‘ the said C. D. as above mentioned; then, and in either of these  
 ‘ cases, I bind and oblige me, my heirs, executors, and successors, to  
 ‘ make payment to the said of the foresaid sum of  
 ‘ of principal, of of annualrents, making together the sum  
 ‘ of, and that at the term of Whitsunday next, with a fifth  
 ‘ part more of penalty in case of failure,’ &c. &c.—Here we ob-  
 serve a further term is given to the cautioner to pay the debt; and  
 it remains a matter of indifference to the creditor whether the bond  
 is forfeited from necessity or from choice.

In order to make the bond of presentation a ground for a sum-  
 mary charge, it sometimes concludes with the following clause:  
 ‘ Lastly, I hereby consent that an instrument taken in the hands of  
 ‘ a notary public, before two witnesses, upon my failure to present  
 ‘ the said C. D. in terms of the preceeding engagement, together  
 ‘ with these presents registered in manner after mentioned, shall be  
 ‘ sufficient to found a summary charge against me for payment of  
 ‘ the said debt, reserving all other objections against the said instru-  
 ‘ ment, or the facts therein set forth.’—Without a clause of this  
 kind, a bond of presentation is certainly not a sufficient warrant for  
 summary diligence, and that any such charge, if given, ought to be  
 suspended without caution or consignation.

From the decisions upon this subject, it was observed, that the  
*sickness* of the debtor is sustained in law as a sufficient excuse to the  
 cautioner for not presenting him in terms of the bond. With this  
 view, Spottiswood tells us, ‘ That it is most expedient to make pro-  
 ‘ vision against all unforeseen accidents, such as sickness; and, in  
 ‘ that case, the clause must run thus: “ Likeas it is hereby special-  
 ‘ ly provided and declared, That in case the said B. should be so  
 ‘ indisposed by *sickness*, that he cannot go to the foresaid place at  
 ‘ the said time without danger to his health; then, and in that case,  
 “ it

“ it shall be a sufficient exoneration to me to take the said messenger, “ or any other the said C. shall appoint, to the house where the said B. shall be lodged for the time, and there present him to the said messenger, the house being always within the town of Edinburgh \*.”—Something of this kind may be done ; but, to the honour of the country, no instances have happened which prove the necessity of it. Creditors among us have not hitherto betrayed that cruelty of temper which requires any particular law to protect the sick or diseased debtor from their vengeance ; neither have we any ordinance to protect the aged and infirm from the ordinary diligence. The later Imperial law gives an example worthy the imitation of mankind. It did not allow the creditor to disturb his debtor by any kind of process or legal execution when *in sickness*. If he ventured to do so, and the debtor died in his custody, the law condemned him in a sum equal to the debt to the heir of the debtor, and a third part of his whole estate to the public ; and, besides, he thereby stood convicted of notorious infamy. ‘ There is no doubt,’ says Lord Bankton, ‘ that if such cruel usage were followed with us, it would be redressed ; but how far a creditor or executor of such diligence would be liable to such punishment and damages to the party or his heirs, may be doubted.’

Having thus explained the principles and style of the bond of presentation, we conclude the subject by mentioning, that, when parties attend at the time and place of presentment, each of them ought to carry a notary public in their company ; the one to take an instrument upon the performance of the obligation, and the other to take an instrument upon the forfeiture of the bond, in case it be not performed. It is unnecessary to go into the forms of these instruments. The one taken by the cautioner, recites the bond and the appearance of the debtor, in the precise terms thereof ; he then protests that his obligation is performed *in terminis* ; and, therefore,

\* P. 118.

fore, that he is thenceforth totally free and discharged thereof, and of all penalty, claim, or demand, either for presenting the person of the debtor, or for payment of the debt in time coming. The instrument, upon the part of the creditor, mentions the punctual attendance of the party and the messenger, having the caption to receive the debtor as a prisoner, and that for one full hour at least, (better for two hours). The creditor then protests, that, in respect of the non-appearance of the debtor and cautioner, that the penalty in the bond is incurred; that he shall not be obliged to receive the debtor thereafter; and that the cautioner has thereby become liable to him in payment of the debt, principal, interest, and expences, in terms of the alternative in his bond; and also in payment of the liquidate penalty therein contained. It is also necessary to know, that cautioners in these bonds of presentation have no relief against the other cautioners in the principal bond. In this respect, they are in the same situation as magistrates who have suffered debtors to escape out of their prisons\*.

Cautioners in bonds of presentations are not bound for liquid sums, but *ad factum præstandum*; and therefore they are not entitled to the septennial limitation introduced by the act 1695. This point is illustrated by a singular case, *Monro contra Bain*, 22d July 1741, reported by Kilkerran, under the title *Prescription*. A cautioner became bound in a bond of presentation, that the principal should, upon a day certain, compare personally at Inverness, in the messenger's house, and then and there pay the whole sums, principal, annualrent, and penalty, mentioned in the letters of caption, with all other expences of diligence. The Lords found, 'That this obligation upon the cautioner fell under the act of Parliament anent the prescription of cautioners.' Kilkerran observes, 'That a simple bond of presentation, that the debtor should present himself, would not have fallen under the act of Parliament; but the

\* February 1731, Graham.—Erskine, p. 474.

\* the cautioners being here bound that the debtor should also pay, was found to distinguish the case : Notwithstanding it was pleaded, that, by the words, the cautioner was not bound to pay, but only that the principal should pay ; and so the cautioner being only liable consequentially upon the principal's failure, he was no more bound for a sum of money, than he is in a simple bond of presentation, whereby he becomes also consequentially liable upon the principal's failure to present \*.

In practice, obligations of this kind are more frequently granted by letters in a hurried manner in public-houses. Whether the Court would make any distinction between these and the effect of formal bonds, is not known ; but there can be no doubt that a formal deed is in every case to be preferred. One thing we venture to recommend, that, when we are laid under the disagreeable necessity of ordering captions to be executed, it is for the interest of our employers to desire the messenger to accept a good bond of presentation. The chance for the recovery of the debt becomes thereby much greater. There is the neglect of the cautioner and the party, on the one hand ; and, on the other, the debtor will exert himself to the utmost to settle the debt, and to save himself.

We have now left no circumstance behind us in the execution against the body of the debtor. We judge it the more requisite, that, since the late insolvent acts, the execution against the moveables has been very seldom used, because little or nothing was to be got by it but expence and trouble ; and therefore more debts have been recovered by caption since that period, than by any other diligence of the law. In doing this, creditors wisely avoid the actual incarceration of their party ; but, by holding him in constant dread of it, are sure to get hold of every security in the debtor's power to give.

*Suspension.*



---

### *Suspension.*

**B**Y the constitution of the kingdoms of England and Scotland, the King is the sole fountain of jurisdiction. This jurisdiction, too heavy to be exercised in person, is committed to judges of his own appointment, by special writs or brieves issued from his Chancery. As the Roman Emperors acted by the ministry of a great officer or secretary, who had a general superintendence over the executive writs issued for the government of the empire; so the several kingdoms of Europe, formed out of the members of that vast body, had in each of them a great officer who filled a similar department. In France, and in this island, this great man got the title of *Chancellor*. To his province it fell to devise and make out all writs, brieves, and letters patent; and, in order to give them authority, he had the custody of the King's seals, that he might seal them, or, as it is termed, *order the seal to be appended to them*. When, therefore, any grants were improperly obtained from the Crown, to the prejudice either of the Prince or his subjects, it was the Chancellor's business to inquire into the matter, to *stop* or *suspend* the execution of the writ, and to recal it if improper. When the courts of law, proceeding upon the strict terms of the King's original brieves, were unable to give the redress to a party which his case required; or when, by a rigorous application of the common law, the subject suffered real injustice, no other method was left to the injured party but an humble application to the King for relief.

Upon

Upon these occasions, the Chancellor, who was presumed to unite in his person both piety and learning, was called upon to advise in what manner justice was to be reconciled with strict law. This was an appeal to the King's conscience; and, as the Chancellor directed it, that dignified officer got the title of *the keeper of the King's conscience*. From these beginnings, and by slow degrees, arose the power of the Chancellor of England, and the grand distinction between the courts of common law, and the great court of equity in which that officer presides. Upon due consideration of the circumstances of the case, he mitigates the severity, and supplies the defects of the judgments pronounced in the courts of law. The form in which an application is, at this moment made, is by a *bill* or complaint, stating the circumstances of the case, the reasons drawn from it, and concluding with a humble prayer for relief. The Chancellor, if necessary, grants upon *this bill*, an *injunction*, commanding all execution to cease until the matter set forth in the bill be inquired into and determined. This injunction protects the party complainant; but, to bring the person complained upon into court, a writ of summons is issued, under the name of a *subpoena*, so called from the consequences of non-appearance, which are the same with our certification. In the courts of law, all processes or actions commence upon *briefes* issuing from the Chancery, commanding the judge to do justice, which is a form extremely different from a humble supplication to the Chancellor for redress.

We had formerly occasion to observe, that, of old, all actions and suits proceeded by *briefes* issuing from the Chancery of Scotland, which, as in the South, was the *officium justitiæ*, under the direction of the Chancellor of the kingdom. Redress in equity was applied for to the King, who granted it by the assistance of his Chancellor and Council. The ancient *briefes*, upon the universal prevalence of the Roman law, and the continental system of feudalism, went by degrees into disuse. Our inferior judges assumed the jurisdiction of causes upon complaints *per modum querelæ*, and sum-

monses by their own authority. At the establishment of the College of Justice, the power formerly exercised by the King and his Council, so far as regarded the civil business of the nation, was entirely devolved upon that body. The College of Justice became thenceforth the King's Court; the powers of the Chancellor were united to it; and the 40th article of the Institution provides, 'That the Lord Chancellor being present in the town of Edinburgh, or any other place, he shall have a vote, and be President of the said Council.' Being thus invested with the powers of the judges of common law, and the Pretorian or supreme jurisdiction of the King or his Chancellor, they issued writs of process by their own authority; summonses in the King's name, and under his signet, took place of the ancient brieves issued by the Chancery; and the equitable powers which formerly resided in the King, his Chancellor, and Council, rested entirely in the new Court.

This equitable, pretorian, or correctory jurisdiction, came to be exercised by applications to the Lords, and the writs for that purpose, from the Latin word, and ecclesiastical practice well known in France, were termed *suspensions*. The injunction they called a *fist*, and the *subpoena* was granted in the same writ, in the form of a summons; which accordingly makes a remarkable part of the will of our suspensions at this moment. The suspension then is the writ by which the equitable powers of our Court are exercised; and by which every error in the decrees of inferior judges, or in the decrees of the Supreme Court itself, is ultimately corrected. The form retains a coincidence with that of the Chancery of England, which proves the deduction we have given, and the analogy we have pointed out: 'Sir Edward Coke says, That the Chancellor, or *Cancellarius*, has his name *a cancellando*, from cancelling the King's letters patent, when granted contrary to law, which is the highest point of his jurisdiction.'—'Gif the King (says Balfour) give any privy writing whilk is direct contrare to the administration of justice, or hinders and postpones it, the Lords of Council may discharge or suspend the same.'

In this narrow country, the same firm and broad distinction could not be made as in England. The civil business of the nation was often too much blended with the political government; and, therefore, though the King had united his Chancellor with the College of Justice, yet he retained a personal jurisdiction for himself and his Privy Council, which clashed with that of the civil judges, and continued from the days of James V. down to the union of the kingdoms in the reign of Queen Anne, to distract and confound the business of this country. So long as the Privy Council of Scotland and their powers lasted, a constant collision in point of jurisdiction took place between them and the Court of Session, which deprived the subjects of real security for their persons or their property; and from this divided power, may fairly be deduced the greatest part of the evils under which the people of this country groaned, during that long and unhappy period.

Balfour tells us, ' That the Lords of Session were not judges competent in causes of suspension of any letters of horning, direct by the Lords of Secret Council, because the Lords of Secret Council, who were the givers of the decree, are judges to all letters and other contraventions, which flows and arises from the said decree, 13th June 1545, Marion Tours against the Laird of Weems.'— ' But gif the party fulfils and obeys this said decree, the Lords of Council may suspend the letters of horning given by the Lords of Secret Council\*.' The meaning of this last decision is, that the Lords might retain the party from the consequences of rebellion and escheat, following upon the horning issued by the other jurisdiction. This was a disagreeable situation for the subject. Two courts, whose views and interests were often entirely different, had it in their power to oppress the subject by the very same mode of execution. Both of them were Royal Courts, the King was supposed to be present in each; and, therefore, both assumed the same

Z z z

mode

mode of explicating their jurisdiction, which formerly belonged to the King alone, viz. the terrible process of outlawry : Whereas no judge in England possessed it, but the Chancellor, to whom alone it is to this day confined.

Let us now examine the particular part of business, which in this country created the necessity and multiplied the number of these applications in equity. Officers and messengers were not formerly under good regulations ; and it was not uncommon to obtain decrees upon false executions in absence of the defender. In such circumstances, it would have been the height of injustice not to hear the parties. Decrees in absence, or as they were then termed, for *null defence*, were often pronounced ; and the then state of the country afforded a variety of plausible excuses for the non appearance of defenders. Many other cases occurred but particularly that one of decrees of consent upon registered writs. If the parties were not heard by some such device, they could not be heard at all. Even in causes where the parties had been heard, and decree given, as the civilians say, *in foro contradictorio*, evidence often emerged after sentence, and before execution ; which, had it been known before, would have prevented the decree.

The form of the English bill in equity, and the Scottish suspension, was exceedingly natural and simple. An action lies to every subject who has suffered, or is suffering a wrong from another. A party who obtains a false decree, or a decree upon unjust grounds, is guilty of a wrong ; and, consequently, may be called by the party suffering before a Court, to have the wrong prevented. This is the principle of a suspension, and consequently the style, which, as we noticed before, joins both the bill and the *subpoena*, is nearly that of a summons, in which the situation of the parties is inverted. He who was formerly pursuer, is the defender, and the defender in the suspension becomes the pursuer. But a summons would not have met the circumstances of this case. Summonses were granted easily and of course, as they import no more than a demand to be m

good in judgment, but here one of the parties had already obtained a decree. We have heard that the interruption or stopping of execution is not a favourite measure, either of the law or police; but if a simple summons had that effect, execution must always have been stopt, and the creditor would in no respect have been benefited by his decree. On the other hand, a common summons would not have availed the debtor, because it did not stop execution, and he might have been poynded, denounced, or imprisoned. These purposes were answered on both sides, by the form of presenting a petition to the Court; upon which an immediate stop was given to further execution, and the judges had an opportunity of determining at leizure, whether a summons of suspension should be granted. Accordingly, we are told in the old form of process left us by Sir John Skene, who wrote in the reign of James VI. ‘that na suspensions of decreets are granted, but be an special supplication of the partie foyter thereof, given to the Lords in writ, and subscribed be them, at least be twa of them, in the name of the rest of the Lords.’

The idea of a suspension is by some writer found in the *induciae moratoriae* of the Roman law. However that may be, it is evident, that the rule of exacting caution was thence taken. The Emperors seldom interposed in delaying the execution of decrees, ‘nisi idonea fidei-jussio super debiti solutione praebeatur.’ And nothing can be more just; for, if an execution is stopt, the creditor, who might at that time have recovered his money, is at least entitled to have caution, that he shall certainly recover it in the end, in case his diligence has been unjustly suspended. This was first introduced into our practice by an act of Sederunt, dated 25th October 1577. The bail thus given, however, proved in many cases no better than the principal; as few laws subsisted, at that time, to check the frauds of private parties. When a decree came to be executed, every thing was covered by collusive deeds, assignments, and sales. Of this we are informed by the act of Parliament 1584, c. 139. which mentions,

tions, ' That the malice of persons had daily so increased, that the  
 ' execution of decreets obtained by maist langsome process, was al-  
 ' together frustrate.' The act, therefore, provides, ' That na sus-  
 ' pension be granted of the same decreets, but upon payment or  
 ' consignation.' This was with great propriety intended to distin-  
 guish decrees obtained by *langsome process*, that is in *foro contentiosissi-*  
*mo*, from all others; but the purposes of this act were lost by inat-  
 tention in practice.

Reasons of suspension were originally intended to be more speed-  
 ily judged of, than any other action; and, therefore, it was held to  
 be a rule, that they must have been instantly verified, otherwise the  
 bill could not pass; and, when it did pass, the Lords, in their deliver-  
 ance or warrant, always fixed the day to which the other party be-  
 hoved to be summoned, because experience proved, that this was  
 not to be trusted to the raiser of the suspension, who had nothing to  
 gain by the issue of the question. Another rule prevailed, that,  
 when a party gave in a bill of suspension, he behaved to state in it  
 all his reasons or exceptions against the debt; and, when the matter  
 came before the Court, he was heard upon nothing but what his  
 own summons contained. This strictness as Lor' Stair informs us)  
 arose from an abuse upon the part of the debtors, who formerly  
 used to give in one suspension after another, and drew out the mat-  
 ter to an unsufferable length. Pretences, however, were soon found  
 for getting the better of this rule. Skene says, ' That the Lords used to  
 ' grant special licence to widows, pupils, poor folks, &c. to eke and  
 ' reform their reasons of suspension; and, by degrees, this method  
 ' of eking became general, and continues to this moment; so that, if  
 ' reasons are stated in the bill sufficient to pass it, the suspender may  
 ' afterwards insist upon as much new matter as he pleases; and it is  
 ' not uncommon to hear a cause pled, without mentioning any one  
 ' of the reasons stated in the libel.'

In presenting bills of suspension, parties frequently gave very par-  
 tial and unjust accounts of the grounds of debt which they craved to  
 be

be suspended, whereby the Lords were much imposed upon. They were further misled by false discharges, and other writs produced with the bill, and afterwards withdrawn; and, therefore, by an act of Sederunt, 27th July 1599, it was ordained, 'That all decreets, ' registered contracts, and obligations, whereupon suspension is ' craved, be extracted and given in with the bill of suspension; and ' that all discharges produced should be subscribed by the procurator ' for the party, and retained at the Bill Chamber.'

The practice of debtors very soon shewed the purpose of their applying for suspensions. After bills were passed, and the day of appearance filled up, they allowed them to lie in the hands of the clerk; and, when that day came, presented a new bill. This was corrected by an act of Sederunt, 24th May 1599, discharging the clerk of the bills to annex the date to any bill till caution be found, or consignation made, and then to be marked of that date.

Suspensions, it seems, became very frequent, and numbers of them, upon trial, turned out to be frivolous. Cautioners, as then taken, were only liable for the contents of the decree; and, therefore, for the better indemnification of the creditor, the Lords, by an act of Sederunt, 23d November 1613, 'appointed caution to be taken not only for obedience to the charge, but also for payment of ' such expences as the Court should modify; and also for payment ' of damages, in case of wrongful suspending.'

Cautioners being bound only for the performance of the party suspender, disputed their obligations when the suspender died during the dependence, and succeeded. Forged receipts and vouchers continued to be produced, in order to pass the bills; but, when the suspension came to be discussed, these receipts did not make their appearance. Cautioners had been offered and received under false designations. These were egregious abuses committed by the parties, and reflect little honour on their doers. The Court itself was not blameless. Each Judge, it seems, passed bills as he thought proper; and, what must now appear strange, the Lords indulged themselves:



selves in a practice of granting warrants and injunctions against the passing of particular bills. Single Judges carelessly allowed bills against decrees *in foro*, contrary to the act of Parliament, and the justice of the case. To clear away these numerous abuses, a long act of Sederunt was passed upon the 29th June 1650, which, among a variety of other regulations, ordains the clerks to detain all the papers produced with the suspension; or, if they happened to be taken away by the practitioners, they were to be liable for the same. They were also obliged to give a certificate that the cautioners were truly deligned in the bonds of caution. Several other practical evils had received a check about the same period. Reference had been made to the oaths of parties; and, at the discussing, these references were deserted, and new reasons insisted upon. Bills were also passed by all the Judges without distinction. To prevent these practices in time coming, an act was made on the 16th January 1650. By these acts, to which, as they are very long and particular, reference is here made, the process upon bills of suspension is brought into tolerable maturity, and every article of it remains in force. The former regulation appointed bills to be passed only by the Lord Ordinary on the bills; but it did not discharge other Lords to grant lifts and stops. Hence the old irregularity once more took place. At twenty five years distance, another act of Sederunt became necessary to restore order in this branch of practice. This act is dated 9th February 1675; and, *inter alia*, discharges all the Judges except the Lord Ordinary upon the bills to read bills of suspension. or to grant lifts or stops upon them. It then gives particular directions to the Ordinary on the bills how to act, which to this day remain in full observance.

It behoved suspensions presented by people in prison to contain a charge to liberate the prisoner, which therefore are termed **SUSPENSION AND LIBERATION**. Imprisonment being the last and full effect of the diligence intended to compel obedience, payment ought to be the only method of immediate liberation. If suspension, however, is demanded, that ought only to be granted upon consignation; for

it

it is palpable injustice to make the creditor enter into the trouble and expence of a new plea, without absolute security for his debt. Liberations, however, were frequently obtained without consignation, and even upon very indifferent caution, whereby the diligence of the law came often to be defeated. A remedy for this evil was introduced by an act of Sederunt, 21st July 1675, which ordains the party to give intimation to the charger, before a notary and witnesses, of his intention of applying for suspension and liberation, and orders the instrument of intimation to be produced with the suspension. This was a necessary and beneficial regulation, and, as such, remains in full force.

All these acts are in favour of the creditor ; the poor debtor had nothing to oppose against the rigour of his party, thus seconded by Judges armed even with legislative authority. Yet necessity, fertile in resources, appears to have been an overmatch for both. The Judges, when over-reached and provoked, made sometimes angry resolutions ; and, when cool, softened the practice, which reduced matters to the old level. Thus juratory caution was introduced, not by any special statute, but by practical indulgence. There behoved to be poor men who had good exceptions to the claims made against them ; but these exceptions could not be heard, because they were unable to find sufficient caution. Every evil has its remedy, and the Roman law suggested an easy one in this case. Therefore, where the suspender made oath that he could find no caution, or no better caution, any person was accepted of. This humanity was soon abused ; and people possessed of sufficient property pretended that they could find no caution. Bills were passed in that manner unknown to the charger, whose diligence was thereby defeated. The practitioners ingeniously presented bills of suspension, containing offers of sufficient caution, in order to procure a favourable reception for the reasons ; and, so soon as the bill passed, they added new reasons, and offered juratory caution. These abuses called loudly for amendment ; and, for that purpose, an act of Sederunt was made upon the

8th of November 1682, which enacts, that all persons wishing to get suspensions on juratory caution, must mention that circumstance in their bills; and they must make intimation to the creditor of their intention, and produce the instrument with their suspension.

Even after suspensions were passed, the obtainers produced or intimated them to the party, or the messenger, but did not *expede* them at the Signet; and, as the effect of this was uncertain at the time, it fully answered the purpose of delay. The creditor was thus left at a loss what to do, because, not being summoned, he could not bring his party into Court; nor was the cautioner bound to him in that situation. This practical abuse was remedied by an act, 3d July 1677, ordaining the silt only to last for fourteen days, where suspensions had been passed but not expedited at the Signet. A method was in a few years discovered, of eluding this salutary regulation. When the fourteen days were expired, a new bill was presented to a different Ordinary, and a new silt obtained. This practice, however, was discharged by act of Sederunt, 9th November 1680.

The former appointments, however strict, were, it seems, insufficient to repress the abominable practice of producing forged writs, which appears to have been the great engine of obtaining suspensions. The Lords were obliged to renew the act 1650, which certainly would not have been necessary, had the clerks to the bills done their duty; however an act passed, 11th November 1691, which inflicted severe additional penalties. The root of this inveterate evil lay in the rule of receiving no reasons of suspension, but such as were instantly verified. Many suspensions were rejected upon this account; and, to make sure, forgeries were committed, and known to be forgeries. For it is observable, that the users of false writs are not prosecuted as forgers; heavy damages and expences were the only penalties against the suspenders detected in that practice.

Where cautioners were unknown or dubious, suspenders offered to get them attested by people of better credit. These attestations  
imported

imported no more than the opinion of the attestors ; and, when the cautioners proved insufficient, the chargers were landed in a proof of the condition of the cautioner at the time of the attest. Decrees charged upon were often found to be informal, or entirely in absence, which the Court, therefore, turned into libels, *i. e.* they held the parties to be in Court, in the same manner as if the suspender had been sued upon a simple summons ; and, when that happened, the cautioners insisted upon being free from their bond. To regulate these matters, an act of Sederunt was passed, 27th December 1709, which tied down both cautioners and attestors in all the cases we have mentioned. The last part of this act, respecting cautioners, appears to be extremely hard and unreasonable. They are bound only in the event of the charge's being right and formal ; but the turning them into libels, shews that they are not so, and that the chargers were not entitled to obtain judgments in their favour ; and, consequently, that the cautioner ought to be free. The reason assigned in the act is far from being a good one ; for, though it be true, that creditors allow many bills to pass, on purpose to get additional security for their debt, yet it is plain, that a charger upon an informal decree could not have prevented a suspension from taking place ; and therefore he had no title to the security of the bond.

Anterior to this period, bills of suspension must either have been refused or passed *in totum* ; a circumstance attended with much inconvenience, and the cause of a great deal of unnecessary litigation, which, with other abuses, was corrected by act of Sederunt, dated 20th November 1711. No other act became necessary, in the matter of suspensions, till of late, when the expence of disputing the admission of bills arose to a degree deserving notice. Many of them were refused ; and, where no penalty happened to be charged for, this expence could not readily be recovered. The Lords, therefore, by act, 19th December 1778, ordained that the Lord Ordinary on

the bills should be allowed to award expences against parties suspending on frivolous grounds.

Our present forms, then, in bills of suspension, are the result of two hundred years experience; and, from the several regulations made in that period, we easily discover the reason and necessity of all the steps now in practice.

The first thing is to draw or prepare the bill. For this purpose, we must be possessed of the charge given by the messenger, and of the decree, bond, contract, or other ground of debt demanded. These we are, in the first place, carefully to read over. If it be a decree, we may analyze it, and consider whether the demand or conclusion of the libel be fairly authorized by the narrative. We next attend to the production, and how far the libel is thereby proved by writing. If all or part of it be made out or founded upon parole testimony, we consider whether such evidence was competent in the question; and examine the interlocutors of the judge allowing the proof. When this is done, we peruse attentively the depositions of witnesses, and the final interlocutor. Hence we form our opinion whether the judgment is right or wrong, in point of fact; or whether it goes further than the written or parole evidence imports. Being thus masters of facts in the case, we are able to form a judgment of the story told by our employer; and what facts it may be proper to add, or what further evidence it may be safe to offer. The next thing is the law, and the reasoning. With these we are furnished in the papers of debate, which the extract contains in the order given in the process. We reduce them into short points; then consult the Institutes for the general principles; next the course of decisions upon the subject, correcting what was wrong in the argument of the decree, and supplying what seems to have been there omitted. Last of all, we search for exceptions in point of form; and, from our notes taken upon the whole, we compose the bill of suspension. If the charge is grounded upon deeds of any kind, we should not be satisfied with particular parts of clauses, but  
ought

ought to read them *verbatim* from beginning to end, and be particularly attentive to the testing clause ; for, in that place, material additions or conditions are frequently inserted ; and particular notice should be taken whether there be any defect in the statutory solemnities.

A bill of suspension consists of three parts. First, It specifies the demand made, and the authority for that demand ; whether decree, registered bond, or bill, &c. For doing this, the charge given must be the rule. It is the duty of the clerk to compare this part of the bill with the charge, and to refuse to present it if there is a discrepancy. The reason is, that the terms of the charge are the rule for the terms of the bond of caution. The next part of the bill is a narrative of the transaction between the parties. Here the suspender accounts for the manner in which he became bound, granted the deed charged upon, or stands subjected to the demand made. In composing this narration lie the chief art and address of the practitioner : It ought to be perspicuous, probable, and adapted to persuasion, by pointing out, in easy and forcible language, but in a general manner, the errors in law, in fact, or in reasoning, which have brought the suspender into that situation. If this is properly done, the particular objection will arise during the perusal. The mind of the Judge is thereby toned and prepared to receive the reasons favourably, because they coincide with his own preconceived opinion. These reasons compose the third part, and ought to be so many plain and natural inferences from the recital. In point of order, the established rule in reasoning should be followed, *i. e.* part of the strongest reasons should be placed first, in order to strike the judgment of the reader ; the weakest should be ranged in the middle ; and the remainder of the best reasons in the end ; because, what is last heard, leaves, in general, the strongest impression.

When the bill of suspension is presented, the clerk writes the date upon the back, towards the top of the sheet. He then reads it to the Lord Ordinary on the bills, who, if dissatisfied with the reasons, refuses

refuses it *instantly*; upon which the clerk writes the refusal upon the bill. Sometimes the Lord Ordinary adds the reason of refusal; and formerly, by the act of Sederunt 1675; was obliged to do so. This refused bill is detained by the clerk, in terms of that act, in order to produce when a new one is presented.

If the reasons appear good or plausible, the Lord Ordinary orders execution to be sifted, and the bill to be answered; and, for that purpose, generally intimated to the charger. This is written in a detached place towards the foot of the bill, as directed by the act of Sederunt 1675; because, if the bill afterwards passes, the sift, being a matter of expedience, is not connected with, or mentioned in the interlocutor of passing. The order to see and answer is also directed by the act 1695, with this difference, that it was formerly only done upon application of the party; whereas it is now done of course in every case. The Lord Ordinary is not obliged to appoint intimation in all cases, because it is presumed the suspender will take that method for his own safety. Public intimation is also presumed to be given by a sift-roll hung up in the Bill Chamber, of all suspensions presented, in terms of the act 1711, to which every new bill is instantly added. In most cases, the Ordinary appoints bills to be intimated, especially where they contain any pointed allegations which appear to admit of an immediate answer. Formerly, it was the practice, that, when the suspender got back his bill, he was obliged to leave a copy of it for the charger in the Chamber. These copies came afterwards to be made by the assistant clerk in the office, and make one of their chief perquisites. The Ordinary may, if he pleases, sift for a month; but ten days is the usual time; and the act of Sederunt 1680 declares, that fourteen days is the full time for seeing and expediting the bill, that is, for doing the whole business.

The sift thus granted is delivered to the presenter, who intimates it to the charger, or his doer, by a notary public, or by his own clerk, or any other person, though formerly it always was done in presence

presence of a notary public and witnesses, in order that a contempt might evidently be proved.

On the other hand, the agent for the charger, who suspects the suspender's intention of presenting a bill, if he either determines to oppose, or to procure proper caution for his employer, does not trust to these intimations. He gives in a note to the clerk of the bills of the names of the parties, and requires him to give notice so soon as such a bill is presented. He is, besides, attentive to the public and daily rolls, and Minute-Book kept in the Bill Chamber. If by any of these means he is properly apprised, he either prepares and lodges answers, or consents to the bill being passed, upon sufficient caution.

In answering bills, we are obliged to follow the order of the reasons, that is, we give a state of the facts or procedure from the information of our employer, contrasting it strongly with the recital in the bill, and thence deducing the answer to each reason in a close, pointed style, carrying an air of conviction in the writer. This answer is followed by a reply from the suspender; so that the passing of a bill becomes a hot dispute, or preliminary process, which draws time, and occasions considerable expence.

Written debates upon bills of suspension carried on in this manner, were early found to be distressing both to the Judges and the parties; insomuch that, by a clause in an act of Sederunt, not yet mentioned, June 2. 1675, 'The Lords discharged any written dispute upon bills of suspension or advocacy; but, where the Ordinary upon the bills shall think fit to allow a bill to be seen, that he call the parties the next day, and hear what they have to say *viva voce*, without taking in written answers.' This prohibition was not observed; only, it has ever since been held, that an answer cannot be received without an order from the Judge. It must, upon the whole, be confessed, that this part of the business is attended with a great deal of trouble to the practitioners.

Suspenders kept up their principal bills, and would not return them to the Chamber to be answered or advised. The timidity of  
chargers



chargers suffered this practice to become a real nuisance ; whereas nothing prevented them from executing their diligence after the days are elapsed ; for it will be remembered, that the acts of Sederunt allowed but fourteen days in common ; and the Lord Ordinary himself has no power to continue it above a month. The Court, however, having punished some real contempts of their authority in matters of suspension, messengers grew timid, and were often terrified from their duty by suspenders assuring them that their bills remained in dependence, though, in fact, refused. To remove these scruples, parties obtained certificates from the clerks, that such a bill was refused ; and this certificate was given to the messenger with the caption. Hence a notion has prevailed, that, after a suspension is once intimated, nothing can be done till a certificate be taken out ; but for this there is no foundation ; nor is the certificate, in these cases, of any real use.

When the written debate is ended, the Lord Ordinary peruses the whole, and either refuses or passes the bill. If the charger desires it, the bill is passed, and the consent marked in the interlocutor, which is in these words, generally written below the principal deliverance '*Pass of consent*,' or the '*Lord Ordinary passes this bill of consent*.' Nothing more is written on the bill till caution be found ; and, by act of Sederunt 1677, this lasts just fourteen days ; these days being given to find caution, and expedite the letters, unless a further delay is given for that purpose by special deliverance ; but this day must not exceed a month, in terms of the act 1677. If further time be wanted, a new bill must be given in ; and, by act 1680, presented to three Lords, in time of vacation, or to the whole, in time of session ; but this act is nugatory ; for that proviso only delays the matter longer, as, bills once passed, the same reasons are seldom refused in a second, if a good apology be made for the delay.

A bond of caution is next made out and executed by the cautioner to be proposed, the form of which may be found in Dallas  
and

and Spottiswood. Almost every word of this bond is dictated by the acts of Sederunt which we have heard. After the narrative, it proceeds thus :

*' Bind and oblige me, my heirs, executors, and successors whatsoever, as cautioners, sureties, and full debtors with and for C. D.'*

—This is obviously in obedience to the act 1650; it is to bind the cautioner, after the death either of the charger or suspender, by making him equally debtor as the suspender himself.

*' Acted in the books of Council and Session,'—i. e.* enacted in the books of Session, the bonds being originally written in a book, by way of a judicial act, in the same manner as the enactments of cautionry are, at this moment, in the books of inferior courts. Afterwards, for the convenience of people at a distance, they were taken separately, but still considered as an enactment of Court.

*' That he shall make payment to the said C. D. or any other person who shall be found to have right thereto.'*—This alternative is the addition appointed by the act 1717, in order to meet the case of third parties appearing for their interest in the course of the suspension, and claiming the proceeds; and which entitles the party found to have the right, to give a direct and summary charge. Spottiswood says, that this clause is proper to suspensions upon double poindings; but he is mistaken, the act and the purpose being equally general.

*' As also, of what further sums may be decerned for by our said Lords, in name of expences of plea, and damage, in case of wrongful suspending.'*—This is in obedience to the act of Sederunt 1613. Spottiswood omits this altogether in the style he gives in his collection, which is a great error; but it is supplied in the form given in the supplement to his book.

When this bond is executed, it is offered to the clerk of the bills, who either accepts it from his own knowledge, or demands an attestor, in case of doubt. If the suspender agrees, an attestation is executed, which is worded in terms of the act 1709, and renders the attestor equally liable as the cautioner, after the latter is discussed.

If the suspender is of opinion, that the cautioner he offers is sufficient, and an attestation inconvenient, he must protest against the clerk of the bills for his damages, in terms of an act of Sederunt made in this behalf, 18th February 1686 \*, which puts the clerk to the bills in a very perilous situation ; but the danger equals not the appearance : It is only the reputation of the party at the time, which the clerk has to answer for. So far not only is the depute clerk liable, but also the principal, and even the Lord Register. If the clerk to the bills persist in the refusal, there is no remedy but an application to the Lords. Lord Stair says, though the Lords be judges of the clerk's reasons of refusal, yet they seldom enter into that debate, but allow the clerk to do as he judges best. In practice, this point is generally settled between the agents for the parties ; and, where the cautioner is unknown to the clerk, some person of credit must inform him as to that person. This dispute about the cautioner often draws more time than the fourteen days ; but, until he is positively refused, the sist is understood to remain in force.

If no cautioner be offered, or if the person offered be refused, and the fourteen days expired, without any new sist or prolongation, the charger may proceed in his diligence ; but, for security, he generally takes a certificate of that fact from the clerk. In case a bond had been actually lodged and objected to, and the objection sustained, the clerk adds a note, expressive of the case, to the certificate. When the bond is received or accepted by the clerk, then, and not till then, he, in terms of the act of Sederunt 1599, fills up the days of comparance in the blank of the bill, together with the name of the

\* ‘ The Lords of Council and Session considering that parties may be prejudged, not only by the clerk to the bills his receiving of insolvent cautioners, but also by refusing of cautioners who are sufficient ; therefore they declare, That the clerk of the bills shall be liable for the party's damage, as well where he refuses a cautioner who is sufficient, or is holden and repute to be sufficient, as where he receives an insufficient cautioner.’

the cautioner ; and, upon the margin, he marks caution received, and signs his initials. The bill then becomes a proper warrant for authorising the letter of suspension to pass the Signet.

If a second bill be presented, it must be to three Lords, in time of vacation, or reported to the whole Lords, in time of Session, in terms of the act, 9th November 1680, as before observed. If a bill be refused in the vacation, another may be presented to the Lords in course, who, by the act 1675, must not pass the same without advising with three Lords. By the same act, the clerk must produce to him the refused bill ; but, in order to avoid this, it is usual to annex new matter, or new reasons, to the second bill, which justifies the Ordinary in considering and passing the same by himself. In these cases, the execution is held to be sifted till three Lords meet, who must pass the same *unico contextu*.

If the decree was pronounced by the Court of Session *in foro contradictorio*, that is, when compareance had once been made by the defender, and defences proponed, though such appearance should afterwards be withdrawn, the bill cannot be passed but by the whole Lords, or by three Ordinaries ; and, that this circumstance might be known to the clerk of the bills, a list of all decrees *in foro* is appointed to be sent him by the Keeper of the Minute-Book, by the regulations 1672 ; but this is now omitted in practice. Neither ought a bill of this kind to be passed but upon consignation, though, in practice, caution is every day received.

If a bill be refused in time of session, it is not the practice to present a second ; in place of that, a petition is given in to the Court, stating the reasons, complaining of the judgment of the Ordinary, and praying the Lords to pass the bill. This petition is either refused simply, or appointed to be answered against a day certain. When the answer comes in, the matter is at once put into the short roll, and advised. If the Lords pass it, it is termed a bill passed *in praesentia*. Parties, in some cases, willing to get clear of the diet

of compearance, consent to discuss the reasons upon the bill. This belongs to the form of process, and so cannot at present be entered into.

The bill being passed, it is carried to the Signet, with the letters as the warrant for signeting, and left with the Keeper, who carefully lays it up as a matter of record, and gives extracts of it upon occasions, which will afterwards be explained.

It is now time to consider the letters of suspension, which we shall take from St Martin; for, if we thoroughly understand the old forms, we can never be at a loss for the new ones. This form, it will be observed, is exactly that of a summons, or *fiat summonitio*, the charge is libelled; the reasons which render it unjust and illegal, and the caution found; and then it concludes, that the same should be suspended by the Lords.

'*Wrongously and unjustly.*'—*Wrongous* is an old Scotticism, now obsolete. There is no such English word; it should be *wrongfully*. The reasons of suspension being, in general, grounded upon equity, and pointed against the letter and rigour of the law, the writ uses the language of complaint, applied to the equitable powers of the Court.

'*Suspended upon the complainers,*'—i. e. hung up over them, so as not to fall or take effect; for a suspension does not extinguish the ground of debt. To do this, an action of reduction is requisite.

'*Relaxed from the horn,*' &c.—This conclusion, at that time, was most necessary, for reasons already explained.

'*And others to be proponed at discussing.*'—This was added to insure to the party the power of eiking or adding his further reasons at discussing, which was anciently disallowed. The day to which the charger is appointed by the will to be summoned, is fixed by the deliverance on the bill; and the diligence is only suspended till the next day mentioned in the will, *that the verity be known*; by which it was originally meant, that the intervening space between the day of compearance, and the day of suspension, was sufficient for

for discussing reasons, which, by law, must or ought to have been either instantly verified or repelled. As that business, however, was found to draw longer time, it was early understood, that the effect of the suspension continued during the dependence of the question; at the same time, if the suspender did not execute his suspension, by summoning the charger to the day fixed by the letters, the effect of it ceased at the expiration of the second day, according to the literal terms of the will, and the charger was at liberty to proceed. In order to understand this perfectly, it must be noticed, that, according to the ancient form, a party defender had no method of forcing his adversary into Court, unless he was possessed of an execution of summons; and, in common actions, it is the case at this moment; consequently, at that time, a charger who stood defender in the suspension, in case it was not executed against him, had no other remedy but the expiration of the days. After cautioners, however, were introduced, and looked to as the security, this method did not suit the charger's interest; he did not choose that the suspension should drop; and hence the remedy of protestation came to be allowed him, whether the suspension was executed or not. Since that time, few suspensions have been executed. This may, however, be done at any time, and is, without doubt, the most regular method of procedure.

‘*Because J. B. has become cautioner for the complainer.*’—When cautioners were introduced, the Keeper of the Signet, as a further check, was ordered not to fix the seal to any suspensions in which caution was not found, and mentioned to be so in the letters; in the same manner as he was afterwards discharged to receive any letters but such as had annexed to them the name of the Judge who passed the bill. Thence it came to be a general rule, to insert, in every case, the whole words of the deliverance in all letters passing the Signet, immediately after the words *according to justice*; from the first word, this clause came to be termed the *because*, which always makes a parenthesis. This is the place which the Keeper of the Signet

Signet compares with the bill ; and, if any of the words are omitted, he rejects the letters.

The date of the suspension is always the date of presentment of the bill, because the intermediate procedure is then held to be of no consequence, and the bill is presumed to have passed, like others, upon the day of being presented.

If we act for the charger, it is our duty to inquire whether or not the suspension be truly expedited at the Signet within fourteen days after the caution is received, and the bill passed ; for, if that is not done, we are at liberty to proceed, in terms of the act, 9th November 1680. If we neglect this, and trust to the putting up of a protestation when the session sits, we may lose the benefit of the caution ; for, unless the letters have been signeted, the cautioner is not bound.

In case the debtor be in prison before the suspension be applied for, we must give notice to the creditor or his agent, under form of instrument, by a notary and witnesses, of the time when the bill is to be presented, and produce an instrument to that purpose. In this case, it will be remembered, that juratory caution cannot be received. If the bill passes, the letters contain a warrant to charge the magistrates of the burgh where the debtor is confined, to give him immediate liberty. The compulsitor, in case of non-compliance with the charge, is the old one, of denouncing the magistrates to the horn ; so that it is in their power to detain the prisoner in jail for a considerable time ; and this, we are told, was frequently practised previous to the Revolution ; but, since that time, instant obedience is given to the letters of liberation.

Thus we have gone through the whole law and practice relating to bills of suspension. At present, we proceed no further than the *expediting of the letters*, because the after steps are properly judicial, and make a part of the forms of process before the Court. This subject, therefore, will be properly concluded with two or three specialities.

cialities which belong to it, but which would have interrupted the course of our inquiry.

When bills are passed upon consignation, the clerk is entitled to one shilling in the pound, or five *per cent.*; one half of which is paid by the configner, and the other by the receiver; although, when sums are large, a composition is always accepted of. A bond of caution must, notwithstanding, be given for the expence of process, and for damages.

Though suspension be truly a summons, and is granted by a *fiat summonitio*, yet it is termed *letters of suspension*. All writs passing the Signet are divided into *summonses* and *letters*. *Letters* are said to respect immediate execution, or something to take instantaneous effect in behalf of the party who obtains them; but *summonses* have no effect but that of bringing a defender into Court; and, as a suspension has the effect of stopping diligence without bringing the party into Court, it is ranked among the letters.

As bail-bonds are excepted from the stamp-act, and a bond in a suspension is properly an act of Court, it is not written upon stamped-paper. When bills of suspension pass on juratory caution, the debtor ought to appear in person before the Lord Ordinary, and make an oath that he can find no other caution. He should also, like a pursuer in a *cessio bonorum*, lodge a disposition *omnium bonorum* with the clerk. The Lord Ordinary generally grants a commission to the clerk to take the oath, which he writes on the back of the disposition. This disposition lies in the records of Court; and, if the charger prevail, he extracts it at the same time with his decree, and claims the property to the extent of his debt, which generally brings on a second action, where little can be got but trouble and expence. The Court have established, that cautioners in suspensions are not liberated, though no diligence be done in seven years from the date, but that they continue bound so long as the charge lasts, which therefore runs the long prescription of forty years.



years. This circumstance renders cautionry in suspensions more dangerous than in any other transaction ; and, what adds to the hazard, is the uncertainty of the amount ; for the expence of process often exceeds the original debt ; yet there is no obligation which people, in general, so easily go into ; and, therefore, when we act for cautioners, it is our duty to explain to them the extent of their undertaking.

*Binding.*

---

## *Poinding.*

**I**N treating the curious and very interesting subject of Poinding, it is necessary to distinguish the several kinds of it established in our law. That done, we shall single out the species which is to be particularly considered, borrowing only from the others what may be necessary for illustration. The first kind of poinding is that by land-proprietors and superiors for the rents and duties owing by their vassals and tenants. We term this the *first*, because it is the most ancient, and evidently appears to have given birth to the whole practice. The next species, in the order of time, is the poinding of moveables, at the instance of creditors, for payment of their debts. The third is the poinding of tenants by heritable creditors, which we denominate *poinding the ground*, but which, in reality, differs not from the first kind, except in form, the principle being the same; and, lastly, there is the poinding of the land itself, the true poinding of the ground before the introduction of adjudication, and which was commonly termed *apprising*.

It is the poinding or execution against moveables, for payment of common debt, which we are at present particularly to treat of; but all the rest mentioned are intimately connected, frequently meet in the course of their progress, and reflect a mutual light upon each other. While the military or feudal system remained in what is termed its purity, land was the only object of property; moveables stood in no consideration; the land was held by the vassal by a variety of

conditions ; and a breach of any of them forfeited the fief, and entitled the lord to re-enter to the possession of it. Traffic being unknown amongst a people fitted for, and employed in war alone, the only debts or claims then existing were feudal, arising from the rents or services due for land ; so that, for a long period, land alone may be said to have been taken in execution, in the first instance. Afterwards, this rigour declined ; feus were granted upon other considerations ; and the people, by enjoying long possession of the same spot, acquired a stock of goods and cattle. It appeared, in this situation, evidently unnecessary and unjust in the lords to seize upon the land, when the moveables upon it were more than sufficient to answer the amount of his demands ; and hence arose the practice of the lord seizing the goods of his vassal, instead of the land itself. It will here be observed, that the superior's true claim lay against the lands themselves, and not against the goods which were not held of him ; and, therefore, though he seized the goods, he did not apply them in payment, but was obliged to detain them as a pledge, in order to force or distress the tenant into payment, or performance of what he was due for the lands. Hence the thing seized was termed *a distress* ; and the action of the superior in seizing it, was called *distressing*. The goods seized not being made the property of the lord, he was obliged to have a place for keeping them, which was termed a *park* or *pound* ; and it continues in England to be so termed at this moment. The putting the goods or cattle seized into this place, always was, and is yet termed *pounding them* ; and hence, by a small variation in our orthography, we have our common word *poind*, which does not seem to have been applied in the manner in which it now is, until about the middle of the fifteenth century. This mode of distressing vassals was done by the proper authority of the lords themselves, *i. e.* they seized and poinded the goods ; but the King's officers or judge of the place had power to redeliver them to the vassal or tenant, upon his finding security for his lord's satisfaction. This was

was termed *repledging*; and the interference of the King's judge was held to be a *justification*. A plain remainder of these manners we have in the poinding by our heritors or barons for their rents.

One of the capital disputes between Henry III. of England, and his barons, respected the powers which these barons assumed, of doing every thing at their own hand. They seized the goods by themselves and their officers, and they refused to allow them to be repledged. They drove the cattle into other counties, and committed the most grievous oppression in every possible shape. Even these men who had obtained Magna Charta, who had established liberty sword in hand, meant that liberty for none but themselves; nay, they included in their idea of it, the power of oppressing every creature under them. An old chronicle, mentioning this circumstance, says, that the barons, after they carried their point, *evaserunt totidem tyranni*; and, as the commons could not resist their oppression, the only altar of refuge was in the Crown. The barons insisted upon determining their own acts of oppression in their own courts, and protecting their officers, the tools of their cruelty, under their own jurisdiction. ‘ Those powers (says the Honourable Daines Barrington) which they could not obtain from the King, they exercised during the ensuing troubles; and it was high time to put a stop to these enormities and violations of justice, which was effected by removing the complaint from the court of the great baron to those of the King, where the judges were indifferent between the oppressed peasant and the tyrannical lord \*.’

In the very ancient statute to which Barrington here refers †, the distinction is clearly marked between the poinding of vassals, and the poinding of debtors. Landlords were entitled to make their distress *brevi manu*, and they are so at this moment by their own officer. The usurpation corrected was, that these barons or great men refused to be justified by the King's courts, *i. e.* they refused to do justice

\* Barrington on the Statutes, p. 58.

† 52d Henry III. c. 1.

to the party by allowing the legality of the distress, or claim, to be tried by the law. Following the example of the great men, private people ventured to distress one another for debts. In these, it was illegal to make the distress itself without the award of court; and the practice is accordingly discharged.

The same practice had taken place in Scotland, but not to such a high degree, though our national troubles had been greater and longer than in England. With regard to great men, a statute of Robert I. remains equally explicit with that of Henry III. Lord Kaimes mentions several of the statutes by which such licences were restrained. The first is c. 7. of the first statute of the same Prince, Robert I. statuting, ‘That, in time coming, na man fall take ane poynd for anie debt auchtand to himself within ane ither man’s land or heritage, bot gif the King’s baillie, or the baillie of the ground, be present.’

That these acts, like that of Henry III. were correctory of an illegal practice, is evident from section fourth of the last act. ‘Na man fall take ane distress or poynd, without his awn fee or heritage, for service aucht to him furth of lands halden of him, nor fall not take any superfluous distress.’ Here, it will be observed, the same distinction is made as in the English statute. A landlord might legally take a distress, at his own hand, within his own fee and heritage; but it never could be legal that he should do so in any place without that jurisdiction. Creditors in ordinary debts were, in no shape, entitled to make the distress *brevi manu*, without the authority of an officer of the law. The same law is distinctly renewed by c. 12. of the statutes of Robert III. ‘Item, It is statute generally by the King, that na man fall take ane poynd without the King’s officars, or the lord’s officars of the land, bot within his awn dominions, for his fermis or proper debts.’ ‘And gif anie man take ane poynd without officars of the King, or of the lord of the ground, troubles any man’s lands, or takes or carries away any thing furth of them; that poynding before the lieutenant  
nant

‘nant or the justiciar fall be esteemed and halden as rief be dittay  
 ‘or be pledge, i. e. (Skene adds) be borgh or caution to be found  
 ‘by the poynder at a certain day.’

The repetitions of the same laws at different periods, show that the practice was always illegal ; for, supposing we had lost all the statutes prior to Robert III. it would be a mistaken inference thence to suppose that the practice had been legal prior to the date of that act. The taking of these distresses was not an execution, but merely to force the party to appear before the judge, and to find caution for performance of the decree. Thus, by the 22d chapter of the 4th book of Regiam Majestatem, which expressly treats of this subject, it is provided, ‘That pledges being found, the poind fall be sent  
 ‘back again to the place wherein they were first taken ; and he  
 ‘qua took the poind, if he please, fall come to that place, and crave  
 ‘his debt.’

A remainder of *brevi manu* poinding still exists, viz. the poinding of cattle trespassing upon fields that belong to other men, which, from the necessity of the thing, exists in every country of Europe. A poinding of this kind is not an execution, i. e. the cattle are not seized with an intention to alter the property, but to force payment of the damage done by them. Our writers generally confound these circumstances of ancient poindings.

By a proper explanation of the doctrine of distresses, the veil is in a manner drawn from before the ancient forms and principles of the law both in England and Scotland. All jurisdiction, from the baron to the King, was founded upon feudal ideas. Attendance at the lords courts, or suit service, was a part of the duty due by the vassal for the land ; and, as the whole subjects were feudatories of the Sovereign, they all owed attendance at his courts. The payment of rents, or the non-performance of duties, we have heard, were, after the establishment of the vassal's property in the land, enforced by seizure or distress of his moveables. If the lord's claim consisted in performance of something upon the part of the vassal to which

which a distress could not be commensurated ; or, in the language of our law, if the demand was not liquid, so as a poinding could be executed to the exact amount, then one distress followed another, till the vassal was constrained to performance ; which practice is yet well known, under the title of *distress infinite*. Now, the suit in service, or the attendance at the court of the lord, in obedience to his decrees, was evidently a feudal duty incumbent upon the vassal, in consequence of the property held by him. If he failed in rendering this service, he was liable to a fine ; and the payment of this fine was enforced by distress. If he did not pay or perform the second time, he was again distressed, and so *ad infinitum*, till he rendered due obedience. From this source arose the profits, unlaws, fines, and amerciaments of the feudal courts, from those of the Sovereign down to the baron ; and thus the system of distresses came to be completely established over the whole kingdom. Obedience to the decrees of the courts became, in this view, a part of the duty of the lieges or subjects, independent of all other considerations, upon which politicians and moralists build the fabric of society. If the parties did not appear in court, they were compelled by a distress of their effects ; and, if they did not obey the judgment given, the decree was also made good by distress, which was the general system established in the country. Let us next inquire into the progress of the same business in our burghs.

By charter 47th chapter of the Leges Burgorum, it is provided,  
 ‘ That nae burgeis may tak a poynd frae another burgeis, but he shall  
 ‘ pass to his house with ane officiar or sergeant, and fall assign him  
 ‘ ane day to compear at the next court. Gif he refuses to pay the  
 ‘ debt, and gif he please to pay it, he shall pay it. And gif he com-  
 ‘ pears not at the day assigned to him, he shall be unlawed, and shall  
 ‘ be summoned again to compear at the next courts following.’  
 The poind here mentioned was not meant to be taken in execution, but as a pledge for appearance in court, and obedience to the decree. The suit being determined, execution could not take place but  
 by

by authority. So we find by c. 4. of these laws, 'That ane  
' burgesis may not poynd ane other burgesis dwelland within the  
' samen burgh, without licence of his provost.' But, with respect  
to strangers, the case altered widely. The 3d chapter of the same  
laws declares, 'That a burgesis may poynd ane uplandisman, (so  
' Skene translates *foris habitantes*), or the burgesis of another burgh,  
' without the time of mercat within or without the house.' By  
chapter 37. it is provided, 'That uplandsmen may repledge their  
' poynds three times, frae ane ouke to another ouke; and thereaf-  
' ter by thrie days, and na longer.'

' And gif they will not, be reason of frowartness, louse their  
' poynds, be finding of pledges therefore, and they die for hunger;  
' gif it be ane horse, or other beast, the burgesis fall cause it be drawn  
' forth of the house and gar flea it, and fall keep the forehead and  
' the taill, and thereafter fall take ane other poynd for his debt.'

Here is evidently the continued distress of the English law; for  
the poinder could not sell the horse or other animal poinded; it was  
no more than a distress to force him to find a pledge or bail for the  
debt within the jurisdiction of the burgh.

Lord Kaimes falls into a mistake in treating of this subject. He  
constantly supposes the distress for appearance, and the execution  
for payment, to be the same thing. 'While the practice (says his  
' Lordship) subsisted of poinding *brevi manu* for payment of debt,  
' there was no necessity for the interposition of a judge to force pay-  
' ment. When courts, therefore, were instituted, a process of debt  
' was not known. The rough practice of forcing payment by pri-  
' vate power being prohibited, an action became necessary; and the  
' King interposed by a breve, directing one or other judge to try  
' the cause \*.'

The purpose of the *brevi manu* poinding in the burghs, which his  
Lordship had just mentioned, had no other intention than to force the  
the:

\* Tracts, p. 303.



the stranger before a court ; and such was the sole purpose of this species of poinding both by landlords and creditors. The execution for payment of the debt was, from the earliest notices of history or record, by public authority alone. Were we to admit hasty conjecture, it would be to allow, that there was no law in the kingdom anterior to the statutes of the Scottish Princes quoted by his Lordship ; and that the first jurisdiction known was established by brieves from the King, which became necessary after the prohibition of the rough practices he alludes to. This would be wide, indeed, of historical truth. The Saxon polity, which existed before the conquest, is the boast of English lawyers and politicians. The business of the nation was, at that period, executed in the county courts in a manner envied by after ages. The Conqueror ruined that masterpiece, as it is termed, of judicial polity, and erected upon its ruins the Aula Regis ; and thence issued the Norman brieves, purposely (as Judge Gilbert observes) to give the nation to know, that not a motion was to be made, or a suit to be determined, without a special command from the Prince. The same forms were introduced into Scotland at the earliest periods we are acquainted with ; and it is clear, that a complete set of brieves, suited to the business of the nation, had been long and perfectly established prior to the laws by which Lord Kaimes tells us the *brevi manu* poinding was discharged, and the brieves rendered necessary.

We will now proceed to the writs which authorised the execution of poind or distress in both kingdoms ; and here we are sorry to be obliged to correct another error of that eminent lawyer. ‘ The brieve of distress (says he) corresponding to the English brieve *justities*, must be examined more deliberately, because it makes a figure in our law.’ After mentioning the effect of the Scots brieve of distress, he says, ‘ This brieve explains a maxim of the common law of England, *Quod placita de catallis, debitis, &c. quae summam quadragintorum*

‘quadragintorum solidorum attingunt vel excedunt, secundum legem et consuetudinem Angliae sine brevi regis placitari non debent \*.’ The original jurisdiction of the sheriff of England extended to all civil causes whatever. The restriction of it to forty shillings without a brieve, did not arise from an indulgence; it arose from the revolution in the government of the kingdom introduced after the Norman conquest. If the sheriff happened to be an Englishman, he was ignorant of the new system of Norman laws; and if a Norman, which was generally the case, his jury or assize were Saxons, and would not find in the case as he directed; which at last brought the county courts into disrepute, and carried every thing to the Aula Regis, the court of the King. This was a part of the plan laid by the Conqueror, and pursued by his sons, to subdue the kingdom, and they completely effected it. The supreme courts refused to receive trifling causes, and restricted the value to forty shillings; and therefore it was that suitors were afterwards obliged, before being entitled to bring an action in the King’s courts, to make affidavit that the value of the thing claimed exceeded forty shillings. The limitation of the jurisdiction of the sheriff, therefore, to this small extent, did not, as Lord Kaimes supposes, proceed from an indulgence granted by the Crown; it was a remainder of an original jurisdiction vested in him by the old common law of England; and therefore the writ or summons proceeded, and still proceeds, by his own authority. It is termed a *distringas*, or county warrant, and is in this form: ‘Preceptum est ballivo ibidem quod distringat F. D. per omnia bona et catalla sua quod sit ad proximum committatum meum ad respondendum A. B. de placito debito, teste meipso.’ &c. The sheriff derived his right from the ancient *comes* or *earl* of the county. His power was considered to be strictly territorial or feudal; and, therefore, as lord of the county, he could only enforce that jurisdiction by distress infinite, just like a proprietor

\* This rule he quotes from Bacon’s abridgement.

tor of land ; and, for every default of appearance, the defendant, like a tenant or vassal, is, at the moment, distrainable till he come into court, and give common bail. The King, however, in some cases, in order to save expence to parties, returned to the sheriff his ancient jurisdiction in a particular case. This he did, or still may do, by a brieve, termed *justities*, which is the writ mentioned by Lord Kaimes as analogous to our brieve of distress.

‘ In the county courts, (says Dalton), pleas are sometimes holden by the King’s writ out of Chancery, which is called a *justities*, or vicecomital writ, for that it doth give special power to the sheriff to hold plea in his county court ; and this writ is for the dispatch of justice in special causes, wherewith the sheriff, of his own authority, cannot deal in his county court, and is, in effect, but a commission, and giveth this authority to the sheriff in these words\* : “ Praecipimus tibi quod justities A. quod juste et sine dilatione reddat B. viginti solidos quos ei debet, ut dicit, sicut rationabiliter monstrare potest, quod ei reddere debet, ne amplius inde clamorem audiamus pro defectu justitiae,” &c.

The very same brieve we find to have been an established form in the law of Scotland, as early as any knowledge we have of that law. It was termed *breve de debitis*, the brieve of distress for debts ; and, by c. 5. of the Regiam Majestatem, c. 4. we find, ‘ That it was to be determined before the justice, sheriff, or baillies of burghs, as it should please the King by his letter to command them particularly, within his jurisdiction †.’ The difference between our brieve of distress, and the English *justities*, lay only in this circumstance, that the execution upon the *justities* proceeded by distress in the same manner as in a common case. The compulitor, therefore, was limited to mere distress, as in a cause of forty shillings value. The Scots brieve of distress gave the sheriff not only a power to sell, but, upon defect of the sale, to comprise and deliver them to the creditor  
in

\* P. 420.

† Vide Quon. Attach. c. 49.

in payment of his debt, which was a plain and a complete remedy. Lord Kaimes justly observes, that this method was preferable to that presently in use, which enjoins not a sale of the goods, but that they be delivered to the creditor at appraised values. ‘ This says his Lordship is unjust ; because, instead of money, which the creditor is entitled to claim, goods are imposed upon him to which he has no claim \*.’ Our present form does contain a kind of sale previous to the adjudication of the goods to the creditor. We shall afterwards point out in what manner our old form came to be corrupted into the barbarous and unjust execution against the moveables, which has long subsisted, and continues to subsist in Scotland. Another remarkable difference between the *justities* and our brieve of distress was, that the former appears only to have been granted to a particular sheriff, authorising him to judge in a particular debt ; whereas the latter is granted to all sheriffs to whom the brieve is presented, and authorises them to judge in every question of debt due to the bearer ; in all which circumstances, our brieve of distress coincides with the French *lettres de debitis*. Accordingly, in the order of our Chancery preserved in Balfour’s Collection, the writ is termed *letters compulsorial*.

This brieve passed of course from the Chancery of Scotland, and was not granted upon any particular consideration, like the English *justities* ; and hence we are entitled to conclude, that, to the use of this writ is entirely to be attributed the jurisdiction of our sheriffs in matters of debt. In this part of the island, we have not, like England, any certain knowledge of the powers or jurisdiction of the sheriff anterior to the Norman conquest ; but it was after the conquest only, that the jurisdiction appears wholly vested in the Crown, and emanating, by means of brieves, directed to any judge to whom it pleased the King to delegate his authority. The old Saxon jurisdiction of the English sheriffs had been destroyed, at least restrained to a mere trifle by force, after the conquest of the kingdom. A hatred to

the laws of the conquerors long existed among the people ; and a natural jealousy arose both in the King and his courts, of the lower or county courts, where the native English were assizers. From this circumstance arose the difference between the power of the Scots and English sheriffs, which we shall find growing more and more remarkable in the course of our history. Scotland bowed under no conqueror, and had admitted no mixture of foreign oppression. The King, therefore, had not the same jealousy of his subjects. When he bestows a jurisdiction upon the sheriff, he gives it completely. The *briefe of distress* was not only a writ of course, but it was granted to sheriffs and all other judges, and extended to debts in general. The sheriff was not only empowered to determine pleas between the parties, but also to enforce obedience to his decree, by complete execution both of the moveables and of the land of the debtor. The English sheriffs, on the contrary, when they happened to be authorised by a writ of *justitias*, had no other execution than what originally belonged to them, the power of distress. In order to make sale of that distress, they needed new authorities from the superior court, which are extant in the law books, under a variety of titles, such as *Venditioni exponas*, *Fieri facias executionem*, &c. This material circumstance kept in view, lays open the true original cause of the posterior differences between the law and form of both countries, which we shall have occasion afterwards particularly to remark.

Lord Stair entertained a very erroneous idea of the writ we are talking of. ‘ The third executorial (says he) is by letters of poinding, which, of old, was called the *briefe of distress*, passing out of the Chancery of course, by which the goods not only of tenants, but of possessors of their lands, were poinded for debts, much like the subjects of one state against another, by letters of mart.’ In another place he tells us, that ‘ of old there was no execution for debt, but only against moveables, by the *briefe of distress* or ‘ poinding.’

‘ poinding \*.’ The brieve of distrefs, in place of being a letter of mart, was a mode of justice common to both France and England. It was not a writ of execution ; it was a commission of justice, authorising a judge to hear the parties, to give judgment, and to execute that judgment. To borrow an English term, it was a commission of oyer and terminer, which has not the most distant relation to the barbarous idea of a letter of mart, imputed by Lord Stair to the ancient law of his country.

Before going further, we must remark the following circumstances in the brieve of distrefs. First, A distrefs is made by the sheriff according to the quantity of the debt, in order to force the defender to appear and to answer, as a security for the obedience to the decree. This afforded caution *judicio fisci*. Forty days are then allowed as the *induciae* for the defender to answer ; and he is permitted to repledge the distrefs, *i. e.* to take it back again upon finding caution, according to the directions of the first chapter of the Quon. Attach. When the cause is concluded, the debtor is condemned to pay the debt within fifteen days ; after which, execution, or the second distrefs, proceeds against the effects of the debtor and his cautioner, or against the effects first poinded as a pledge, in case no cautioner be found. In France, these fifteen days were termed the *quinzieme*. In England, though distreffes taken by subjects for rents were mere pledges, which could only be retained, but not sold or applied in payment of the debt ; yet, in the case of the King, they could be sold, but not till after fifteen days from the date of the seizure. In Scotland, so early as the reign of Alexander II. we find, that, when a decree was given by the sheriff, the debtor’s moveables were first to be taken ; and then, by the statutes of that Prince, the sheriff is ordered to advertise the debtor that he was bound to sell his lands within fifteen days ; and, by the brieve of distrefs, no execution could take place against the moveables till fifteen days after the date of the decree. Here is the original of what

we

we term *our days of law* ; for, to this moment, no horning can proceed upon the decree of a sheriff, till either a charge of fifteen days be given upon the decree, or at least till after expiration of fifteen days from the date thereof.

To the process following on the brieve we find several advantages annexed, which are thus expressed in chapter 49. of the Quon. Attach. The first is, ' That nae effoinzies has place in ' this brieve, because command is given that the debt be paid and ' given without delay to him who proves the same.' *Effoinzies* is the Scottish translation of *excusationes*, delays, or dilators, which, it seems, by this mode of process were entirely excluded. The next is, ' That it took from the baron liberty to had court upon his man, ' wha is called for payment of his own debt.' This was a great advantage ; for it behoved to be a very difficult matter to recover a debt from the vassal of a baron, who could only be judged by his own master. The next is, ' That the creditor could simply, without any challenge, conform to the solemn words of the law, ask ' and crave his debt, otherwise than use is, in pleas of wrong and ' unlaw ;' *i. e.* the creditor was not obliged to accuse his party of any injury which might give him the chance of determining the matter by combat, he was only bound simply to demand the debt due to him. Last of all, ' the debt might be asked without amerciamment of either of the parties.' By the ancient constitution of the kingdom, the Sovereign was not obliged, either in England or Scotland, to admit the differences of his subjects into his own courts, or to take the trouble of determining them. When he did so, a fine was exacted from either party. Every person liable in a fine was said to be *in misericordia regis*, of which the word *amerciamment* is a corruption. In this case, as one of the parties had purchased the King's brieve to the inferior judge, neither the pursuer nor defender were held to be *in misericordia*. These advantages discover the reason why the brieve of distress became the most general mode of recovery of debts in Scotland, while the analogous writ of *justities*,

*ties*, in England, seems to have been but rarely applied for or granted. Another reason was, that the *justities* is issued to the sheriff alone; whereas (as the text expresses it) the brieve of distress might be pursued before the justitiar, the provost, or bailies of burghs, as might please the King to command by his letters.

The writ of *justities* appears to have become less frequent in England, because the King's courts being established and settled at Westminster at an early period, drew to themselves the whole civil business of the nation; and, in proportion as their power and reputation increased, all other inferior courts, and that of the sheriff in particular, naturally sunk. In Scotland, on the contrary, the brieve of distress became more and more common; the reasons were, that the King's courts, long in a very unsettled state, followed the court of the Prince; and sometimes they held ayres, circuits, or assizes, but at long and uncertain intervals. Parties, therefore, were under an absolute necessity of applying to the sheriff and other inferior judges, in order to obtain justice. Though, from the whole laws in our old code, we find that the fixed method of ordinary process of our sheriffs, and other judges, was by attachment of the effects of the defender, to compel him to find security to answer to the suit, and by distress or poinding of the effects both of principal and cautioner for the debt; yet, as the Crown had improvidently parted with its own jurisdiction, in granting baronies, regalities, &c. to the feudal lords, it was extremely difficult to bring any considerable proprietors, their vassals and tenants, to justice in the ordinary way; because no sooner were they attacked, than their superiors repledged them to their own courts, *i. e.* claimed the cognisance of the cause in prejudice of the sheriff, who was then acting in his common capacity; but, when the sheriff acted by special command from the King, no defender could be so repledged; it behoved him to answer to the brieve of distress.

We have considered the several advantages annexed to the purchase of this brieve, the principal of which was that expressed in  
the



the Quon. Attach. c. 40. 'It took from the baron the liberty of holding court upon his man who was called for payment of his own debt.' In all cases, therefore, where the debt was considerable, where vassals were the debtors, and resided under various jurisdictions, the brieve of distress was the most eligible and effectual method of procedure; but it does not thence follow, as Lord Stair says, and as all the authors of our Institutes have repeated after him, that there was of old no execution against the moveables, except in virtue of the brieve of distress. When the sheriff poinned in consequence of the brieve of distress, he acted upon a special commission or delegation from the Crown. When he executed decrees pronounced by himself, in ordinary cases, without any brieve, he acted in his proper original judicative capacity. There was another branch of the office of a sheriff, both in England and in Scotland, which our writers, when they talk of ancient poinning, seem to have forgot; we mean, the duty of the sheriff, as a ministerial officer under the King and his proper courts. In England, they were sometimes termed *the King's bailiffs*; and, after the Norman conquest, when their original jurisdiction was limited to forty shillings, they found themselves, in lieu of it, reduced to officers, in place of judges. The sentence was transmitted them by their superiors, in order to be by them simply executed. In Scotland, we find the sheriff in the full exercise of this ministerial branch of business. He was the King's great officer, bound to execute all the precepts and orders of the King and his superior judges. Nay, by a statute of Robert II. we find that the sheriff was ordered not to give implicit obedience to the writs under the seals, until he had considered their legality; and, if they appeared to be contrary to law, he is directed respectfully to indorse his opinion upon the back, and to return it back unexecuted.

The difference between the English and the Scottish sheriffs stood demonstrably thus. The English sheriff had as much of his original jurisdiction preserved to him, as amounted to pleas of forty shillings value.



value. In all other civil cases, he was a mere ministerial officer, bound to execute the precepts and commands of the superior courts. Few or no brieves were directed to him even by the Crown, excepting sometimes the writ of *justities*. Accordingly, Glanville, in his first chapter, which treats of the pleas belonging to the several courts, mentions only the brieve of right, and of bond men, as belonging to the jurisdiction of the sheriff; whereas, in the corresponding chapter of our *Regiam Majestatem* \*, a variety of brieves are enumerated, all competent before the sheriff, and particularly the brieve of distress.

From the difference in the jurisdictions and powers thus vested in the judge ordinary, arose all the differences of the laws and customs of the two kingdoms, in the matter of execution against moveables.

By the brieve of distress, the Scots sheriff was directed to drive the goods or cattle to the market cross, and there they are to be sold by the creditor. If they are not sold, the King's officers, at the close of the market, are to comprize and deliver them to the creditor in payment of his debt. The brieve of distress was not a returnable brieve; the cause was judged of, and the execution completed by the sheriff himself; whereas the English sheriff, acting in virtue of a *justities*, needed an additional writ to authorise the sale of the goods. Now, let us inquire in what manner this business was executed.

' In England, (says Lord Kaimes), attachment of moveables for payment of debt, is warranted by the King's letter directed to the sheriff, commonly called a *Fieri facias*; and this practice is derived from common law, without a statute. The sheriff is commanded to sell as many of the debtor's moveables as will satisfy the debt, and to return the money with the writ into the court at Westminster †. The method is the same at this day, without any remedy where a purchaser is not found. To understand the

VOL. I.

3 E

English

\* Book 1. c. 5.

† Tracts, p. 328.

English execution, it is necessary to know, that the writ of *Fieri facias* issues from the King's courts to the sheriff, in consequence of the judgments given in these courts. It is directed to the sheriff, as our letters of poinding formerly used to be. There is this difference, however, that the *Fieri facias* is a part of the process. The sheriff is here a ministerial officer, in the strictest sense of the word; he cannot pay the creditor, after making money of the goods; he does not give an execution indorsed to the bearer of the letters; but he makes a return or certificate of what is done in consequence of the writ, to the court from which it issued. With the return, he transmits the money which has been levied in obedience to the writ itself, or otherwise the return contains the reasons why the money is not sent. With the money thus returned, the creditor is publicly paid in court, and the debtor consequently acquitted by the record. From this necessity of the sheriff acting under the authority of the superior court, and returning the writ, with the execution of it, arose another capital difference which afterwards followed in the matter of poinding, as practised in the two kingdoms. There is an analogous remainder in the forms of our brieves sufficient to make the idea familiar. Some of our brieves are still returnable, or, as we say, retourable; *i. e.* the sheriff, after executing a brieve of mortancestry, for example, returns the service to Chancery; but, when he executes a brieve of division or tierce, no return is made. The sheriff's own execution completes the right. We may, therefore, consider the English *Fieri facias* as a retourable brieve, and the Scots letters of poinding as an unretourable one.

Before going further, we shall give as distinctly as we are able the progress of the English writs against moveables, in which we shall clearly discern the origin and principles of every circumstance in the Scottish diligence. We have heard, that the execution in the county courts could only be by distress; and therefore the writ was by *levari facias*, *i. e.* the goods and chattels were only to be seized upon, and detained as a pain to distress the party into payment. The  
same

same mode of process issued from the King's court ; and, according to Chief Baron Gilbert \*, it is the most ancient judicial process of the law. The words are, ' Praecipimus tibi quod distringas B. per terras et Catalla, ita quod nec ipse, nec aliquis pro eo nec per ipsum, manum apponat terris, tenementis bladis nec aliis catallis.' This writ, it will be observed, reaches to the rents of lands, as well as to the goods and cattle ; and it goes no farther than a mere seizure for distress. In the King's courts, however, they soon found it necessary to introduce an improvement. ' The King's courts (says Baron Gilbert) at last came to give more effectual remedy than was given in any other ; *adjudicare querenti debitum petitum* ; and hence, in executions, they went one step further, *i. e.* to command the sheriff to levy a certain sum mentioned in the judgment, by which the sheriff had authority not only to seize, which he could do at common law, but likewise to sell the goods so levied †.' Sometimes the *ipsa corpora* of the goods seized were returned to the court of the King, who publicly ordered them to be sold ; and, if not sold, they assigned them over to the party : ' Yet, (continues Judge Gilbert), they had not used the way of appraisement, (*i. e.* they delivered them without appraisement) ; but the statute of Acton Burnal was the first that put this in practice, which says, that the goods should be appraised and delivered over to the party according to the appraisement ‡.' This succeeded so well, that, by the statute of Westminster II. they used, in all cases, either to sell the goods by the *Fieri facias*, or to deliver them at a price upon *the elegit*.

The statute of Acton Burnal is the first part of the famous law made by Edward I. for the security of payment of merchants debts. The other statute, which is generally called Westminster II. is nothing more than the sequel or improvement of that act ; the one made in the 11th, and the other in the 13th year of the same reign, but at different places, Acton Burnal and Westminster. By these

\* Law of Execution, p. 27.

† P. 28.

‡ P. 30.

statutes, authority is given to the mayors of towns, and sheriffs of counties, to seize upon and sell the moveables of the debtor for payment of the merchant's debt ; or, if they cannot be sold, to deliver them over in payment, as also the rents and profits of the debtor's lands ; or otherwise, in the option of the merchant, to deliver him the possession of the one half of the lands themselves.

Though, before these statutes, says Gilbert, the execution at common law was sometimes awarded by the words *Habeas denarios*,—*Fieri facias denarios*,—*Levari facias denarios*,—being words tantamount to the same thing ; yet, from the date of these statutes, the execution was broke into two distinct forms of *Fieri facias* and *elegit*. The *Fieri facias* continued to be the execution upon judgments ; and both the *Fieri facias* and the *elegit* were the executions proper to merchants debts, or to debts by recognisance, which, with us, is the same thing as heritable debts. If the creditor choosed to have his money for the goods, the sheriff sold them by the *Fieri facias* ; or he delivered them together with the lands upon the *elegit*. The sheriff might also have levied the rents and profits of the lands in consequence of the word *levari* in the writ ; but this was not equal to the delivery of the possession ; therefore the *levari* went entirely out of common practice, though it remains in Chancery upon some particular occasions. From what has been said, we have a pretty complete view of the English executions. The *levari* and the *Fieri facias* were the old writs of the common law. The latter went to the goods alone, and the former both to the goods and profits of the land. It answered the purpose of our present arrestment and forthcoming against tenants ; but the statute of Westminster introduced a more complete remedy, the possession of the goods by and apprisement, or of the lands themselves. ‘ By the common law, ‘ (says Blackstone), a man could only have satisfaction of goods, ‘ chattels, and the present profits of lands by the writs of *Fieri fa-* ‘ *cias* or *levari facias*, but not the possession of the lands themselves ; ‘ a natural consequence of the feudal principles, which prohibited ‘ the

\* the alienation, and, of course, the incumbering of a fief with the debts of the owner.'—' The statute, therefore, (meaning the Westminster), granted a writ called an *elegit*, (because it is in the choice or election of the plaintiff, whether he will sue out this writ, or one of the former), by which the defendant's goods and chattels are not sold, but only appraised; and all of them are delivered to the plaintiff at a reasonable appraisement and price, in satisfaction of his debt \*.' If a creditor, by a judgment or decree of the superior court, chooses only to proceed by execution of the moveables of his debtor alone; or, as we would say, by poinding alone, he gets a *Fieri facias*, directed to the sheriff, who seizes and sells the goods; but, though there be no purchasers, he cannot assign them by appraisement, because the *Fieri facias* was a writ at common law, in the process of which no appraisement was known. That method was introduced by the statute of Acton Burnal; and, therefore, if the creditor chooses to have the goods themselves by appraisement, he must sue out an *elegit* upon that statute. In this manner the sale and the appraisement of the goods joined together in our brieve of distress, and only pretended to be joined in our present mode of poinding, were separated from each other in the law of England.

Supposing there were no purchasers, the sheriffs cannot deliver the defendant's goods to the plaintiff in satisfaction of the debt, but must return the execution in court. Instead of doing so, he must return, that the goods remain in his own hand for want of buyers. Upon this a writ is directed of *venditioni exponas*, authorising him to sell at such price as can be had; and, without this, he is not obliged to sell below the first upset price, which is generally fixed by a jury called by the sheriff's own authority. Thus no inconvenience is ever felt in the execution of the *Fieri facias* from the want of purchasers, which Lord Kaimes supposes to be a capital defect remaining in that species of execution.

With

With respect to the *elegit*, the statute of Acton Burnal assigns several satisfactory reasons for introducing the method of delivery by apprisement. The debtor, when he grants the recognisance, knows the consequences of that writ; and, therefore, as the act says, 'has himself to blame if he does not sell his goods with his own hands,' and so save his estate from coming under the *elegit*. In order, however, to do the debtor all the justice which the nature of the thing will admit, the goods are to be delivered *per rationabilem appretiationem*, and the lands *per rationabile extentum*; and such price and extent must be fixed by an inquest, called for the purpose by the sheriff\*. This inquest proportions the value to the quantity of the debt. If the value of the goods be sufficient, they proceed no further; if not, *they extend the land*, as it is termed, to the value of the remaining debt. A return is made by the sheriff to the Court of Chancery, from which the writ proceeded; and there the objections from the debtor are heard against the procedure, if he has any. If there be no lands to suffer extent, the apprisement and delivery of the goods are considered as done upon a *feri*, or *levari facias*; in which, if any of the debt be found due, *a capias ad satisfaciendum*, may proceed against the body of the debtor, which cannot be done if there were lands; because, by the statute, though the creditor may take goods and body, he cannot take goods, body, and lands.

Thus we have endeavoured to explain in what manner both the interest of the creditor and debtor is preserved in the execution, or, as we say, the poinding of moveables, in the law of England. We may thence perceive by what means the injustice and absurdity of our diligence has been avoided in the practice of that law. With them, the business was anciently trusted to, and continues at this moment to be executed by officers of character and responsibility; and yet they are, in that department, mere ministers of justice, under the immediate inspection and controul of the King's courts, to whom they are answerable for neglect and malversation in every particular

\* Com. Sheriff, p. 274.

particular act of this kind. It was formerly mentioned, that the whole differences in the practice arose from the different powers of the sheriffs of the two kingdoms; that the English sheriffs, by the jealousy of the Norman Princes and their courts, were reduced to mere ministers of justice; while the Scottish sheriffs, on the contrary, were endowed by their native Princes with an extensive jurisdiction, and, in their ministerial capacity, entirely trusted with the execution both of their own and their superior's decrees. Hence our process of poidning declined in its propriety and justice, in proportion to the abuses of these powers, and to the neglects and misconducts of these judges; and, at last, the whole business, by a total desertion of their duty, fell into the hands of a different race of men who were chosen to supply their place, *i. e.* the King's messengers, or sheriffs in that part, by whom the execution against moveables has been rendered disgraceful to the jurisprudence of Scotland.

We now go back to trace the particulars of this progress, and to compare the conduct of the English sheriff, in the different parts of the practice of this business, with that of our own sheriff, and our own practice. The first observation we have to make is, that the Scottish brieve of distress contains the substance of all the English writs we have mentioned, and may fairly be said to be a compound of the whole. A commission of justice from the King to the sheriff, for determining an action of debt, is the same as the English *justities*. The sheriff is thereby authorised to seize upon the goods both of the debtor and his husbandman, and to sell them for payment of the debt. This was the essential powers both of the *levari* and the *Fieri facias*; for, by taking the goods of the husbandmen and tenants, it clearly reached the profits or produce of the lands, as well as the moveable goods of the debtor. The apprising and delivery upon defect of sale, gave it, in the next place, the effect of the *elegit*; so far as regarded the moveable goods. The appretiation, too, was to be made by *liel*, *i. e.* honest men of different baronies; and, as their valuation:



valuation was supposed to be just, the goods are to be delivered to the creditor immediately after the market was over; so that they were to be exposed but for one market day at such upset price as the sheriff thought proper, and then appraised by a jury, and delivered to the creditor. For the legality of the process the sheriff was not immediately answerable;—all these things he was empowered to do by the King's brieve itself. That brieve was a pleadable one, but not returnable to any court of the King; and therefore the debtor, if injured, could only be heard by way of complaint. To complete the resemblance to the English writs, let us see in what manner execution extended to the land itself; and this will clearly show in what further particulars the practice of the two kingdoms was analogous, and in what it differed.

By the 24th chapter of the statutes of Alexander II. it is provided, in the precise terms of the brieve of distress, that 'Gif the debtor  
' or his tenants has moveable goods, first of all, they fall be distress-  
' zed for payment of the debt to the creditor. And, gif they have  
' na strenzeable gudes, the sheriff and the King's servants, before  
' the court rise, fall advertise the debtor, that, for inlaik of moveable  
' goods, they are bound be the law to sell his lands and possessions,  
' to satisfy the creditor within fiftene days. The debtor not doing  
' this within fiftene days, the sheriff and the King's servants fall  
' sell the lands and possessions pertaining to the debtor.' By this statute, the brieve of distress is made to reach the lands of the debtor in a manner more effectual than the statute merchant of Edward, or any statute yet made in England. The sheriff is authorised to sell the lands of the debtor for payment of the debt; and he appears to have been totally trusted with this important process, being no more liable to any immediate controul, than he was in the case of moveables. Alexander began his reign in the year 1214, and Edward I. of England in the 1272; so that the execution against land was both earlier and more complete in Scotland than in England.

At

At this period, the execution against moveables in England stood entirely upon the *levari* and *Fieri facias*.

Edward introduced the statute merchant in the 13th year of his reign, and consequently the apprisement and the delivery of the moveable goods for payment of debts by the *elegit*. This merchant law, introduced by the two statutes of Edward, was adopted without much alteration by Robert I.\*. His motive, no doubt, was the same, the encouragement of merchants, by a proper provision for payment of their debts, the good effects of which had become visible in England. This act authorised execution against the body, the moveables, and the lands, for payment of the debts due to merchants. The debtor is to be a quarter of a year in prison, on purpose that he may sell his own moveables; after which, upon a certificate to the Chancellor, it is provided, that the moveable goods and lands pertaining to the debtor, should be taken, comprised, and given in payment of the debt. From the statute, it is clear, this was to be done by a writ from the Chancellor to the sheriff. Accordingly, by section 8. it is provided, 'That gif the sheriff declares to the King that the debtor cannot be apprehended, the merchant shall have the King's brieve, directed to all sheriffs within whas sheriffdoms the debtor has any lands, to deliver all his cattle and lands, under ane reasonable extent, to the creditor.'

Thus we see, in the time of Robert I. the brieve of distress in Scotland became equivalent to, and comprehended the powers of the whole English executive writs both against moveables and land. From the last statute, we perceive in what manner the brieves of distress were directed to sheriff's in general; and we have the reason why the words *poinding* and *apprising* are equally applicable, in our law, both to moveables and land. They were both attachable by force of the brieve of distress directed to the sheriff; and the property of them was made to pass from the debtor to the creditor by

VOL. I.

3 F

the

\* 2d Stat. Robert I. c. 19.

the same form, viz. apprisement to the extent of the debt. We are not, at present, to go farther into the execution against land, which is only mentioned because of its inseparable connection with the present subject.

We have now viewed the execution of the English sheriff against the moveable property of debtors, as it proceeded in consequence of his own original judicative capacity, without the authority of a brieve; likewise as it proceeded upon the commission of justities; and, lastly, as it proceeded, in his ministerial capacity, as an officer of the superior courts. We have only considered the Scottish sheriff as acting under the authority of the brieve of distress, because it appears extremely difficult to discover the particular cases in which he acted without a brieve. The broken materials of our old law-books and statutes do not afford sufficient guides for that purpose; tho', even from them, a variety of instances might be collected, in which he seems to have proceeded independent of any special command either from the King or his courts. Neither is it an easy matter to define the exact particulars of his ministerial duty. Let it suffice to say, that, from a great variety of the laws in our old code, and in the capitularies of our Princes anterior to the reign of James I. it is clear, that the sheriffs of Scotland were immediately subject to the directions not only of the King, but of the Chancellor and Justiciary; whose precepts, in the administration of justice, and civil government of the kingdom, were executed by that officer. But in what particulars his execution of these superior precepts, in the matter of distress and seizure of moveables for debts, differed from the process of the brieve of distress, it is impossible to determine with certainty.

None of the acts of James I. relate to the subject of the present discourse. The earliest notice relating to it which we meet with, is in the first act of the 6th Parliament of James II. entitled, 'Letters of caption to be executed against cursed or excommunicated persons.' This act provides, 'That gif these persons be fugitive,  
' and

“ and may not be overtain by the sheriff and his officears, the lands  
“ fall be, and their gudes arrested and apprised to the party likeas  
“ for other debts, at certain mercat days as effeirs.” All that can be  
inferred from this act is, that the goods and lands of debtors were  
exposed to sale by the sheriff upon so many market days; and, if  
no purchasers appeared, they were apprised and delivered to the cre-  
ditor at that valuation. The particulars of the process, however, it  
is impossible to ascertain.

In March 1457, Lords of Session were appointed by the 61st act  
of the 14th Parliament of this same Prince; and a jurisdiction is  
given them to determine upon obligations, contracts, and all man-  
ner of debts in civil actions. These Judges were a kind of assize or  
*judices in itinere*, who travelled over the kingdom. The sheriffs  
were to proclaim the particular time of the holding their session in  
particular counties, which it appears they were to visit only once in  
seven years. It behoved the decrees of these Judges to be executed  
by the sheriffs; but, as to the mode of execution, we are still left  
entirely in the dark. Sir George M’Kenzie’s observations regard  
only the competency of appeals from that Court, as the immediate  
precursors of the College of Justice. With regard to every other  
circumstance relating to these Lords of Session, he either was entire-  
ly ignorant of them, or he has not condescended to leave his obser-  
vations to posterity.

The next act we meet with is the 36th of the 5th Parliament of  
James III. bearing for a title, ‘ That the poor tenants shall pay nae  
‘ farther than their term’s mail, for their lord’s debt, by the brieve  
‘ of distrefs.’ From this remarkable statute we learn the mode of  
execution which had principally taken place in Scotland during the  
long period preceding. When debts were due to proprietors of land,  
the practical and effectual writ of recovery had been the brieve  
of distrefs. And one of the numerous advantages attending this  
kind of execution was, that it proceeded against all the tenants and  
possessors of the debtor’s ground; their moveables, as well as his

own, were seized upon by force of the writ. This practice, first authorized by the statute of Alexander II. c. 24. had, it seems, in the time of James III. been carried to a very great height; and, as the act emphatically expresses it, occasioned the 'heirship and destruction of the King's common mailers and tenants of lord's lands.' The debts for which the poor tenants were thus distressed, were not the debts of the land, or, as we now would say, heritable debts, but merely the personal debt of the lord. It becomes a matter of curiosity, how a practice so unjust and unnatural got footing in the kingdom. Lord Kaimes derives it from the supposed original slavery of the whole tenants in Scotland to their masters: He supposes them to have been totally incapable of property; and, therefore, that their goods and cattle were supposed to be their master's. This position of his Lordship's we are afterwards minutely to consider when we come to the history of leases. We have only, at present, to mention, that it is evident from the several old laws formerly noticed, made to prevent poinding *brevi manu*, that creditors in common debts, after the example of proprietors of land, treated their debtors in the same manner, and made no distinction between the proprietors, their tenants, and their vassals; thus confounding, in the execution, two things perfectly distinct in their nature. Another circumstance appearing from the history we have given, contributed to establish that right in Scotland. The ancient execution in England was by the *levari* or *Fieri facias* only. These writs reached the whole moveables of the debtor, including the rents and profits of his land. In virtue of them, the sheriff not only seized the goods and cattle of the debtor, but he levied his rents and duties. For this purpose, the writ put him in place of the party; and therefore the demand was limited to the rents and duties due by the tenants to the debtor in the writ; and this was considered as distressing the debtor *per terras et catalla*. Our Scottish brieve intended the same kind of distress, *per terras et catalla*, when it ordered the sheriff to take and apprehend the cattle of the debtor's husbandmen,

husbandmen, which, it seems, came to be executed literally and strictly. Our sheriff's seized the whole cattle they could find upon the land, after the example of the proprietor himself; nay, by the terms of the brieve, he seems to have been obliged to do this, even in preference to the seizure of the proprietor's proper and unquestionable effects. This barbarous practice totally excluded the original idea of the *levari facias*; it was levying the rents and profits of the land at one stroke, by confounding the property of the tenant with the master. Such was the monstrous abuse which the statute of James III. intended to remedy. In the manner of doing it, we evidently see, that the legislature considered the practice as a mere corruption, which had crept in, in executing the brieve of distress. 'The cattle of puir men (says the act) are taken and distrenzie'd for the lord's debts, where the maills extends not to the avail of the debt;' which is just saying in as many words, that the brieve of distress was intended only as an authority to levy upon their tenants the rents truly due to their master. It ought to have gone no further in Scotland than the *levari facias* did in England. The act therefore provides, 'That the puir tenants shall not be distrenzie'd for their lord's debt further than their term's maill extends to.' The purpose effected by this act is nothing more than the restoration of the brieve of distress to its ancient principles and effect of execution. So far as the tenants stood indebted to their master, the sheriffs were ordained to levy upon their goods, in the first place, to the amount of the debt in the brieve. This statutory limitation converted one clause of the brieve of distress exactly into the ancient English *levari facias*. If the debt be not thereby paid, the sheriff is next authorised to discharge the remainder out of the proper goods of the debtor, 'if he has sae meikle within the shire.' This is the *Fieri facias*, which is the term of the writ for execution against moveables in the possession of the debtor himself. In the next place, if the debtor has nothing within the shire, the creditor is directed to come to the King, and bring certification from the sheriff of how much he

he wants ; and the King shall direct his letters ' to any other sheriffs where the debtor has any other gudes or maills within the realme, and gar them be prized, and pay the said creditour within fifteen days, after the form of law.' This act of Parliament regulates execution alone. The decree has been recovered upon the process of the brieve before the first sheriff ; but, as execution could proceed upon it only within that judge's territory, the King engages, by the statute, to grant letters of distress, directed to all other sheriffs. In obeying these letters, the sheriffs acted as mere ministerial officers ; they executed the decree of another by command of the King, their superior, in the same manner as the English sheriffs did upon a *Fieri facias* from the supreme court. Here we find the first letters of poinding, properly so termed ; and the only difference between them and the English *Fieri facias* is, that the latter was returnable to the court from whence it issued ; whereas the Scottish sheriff, by the former, was appointed to make payment of the debt to the creditor himself from the proceeds of his poinding. As these letters were incidental, they, in all probability, issued under the King's seal or signet, and not from Chancery, for they are termed *letters* ; and we cannot discover one circumstance to show that any additional brieve was devised in Chancery, from the reign of James III. In his time it was that the language and the forms of the French law began to mix with, and corrupt our ancient native jurisprudence. The days of the brieve of distress, however, were to run in each sheriffdom ; the sheriff was only to pay the creditor in fifteen days, after the form of law. If the judge before whom the brieve of distress was pursued, had made a sufficient distress or attachment in the beginning of the suit, and that such distress remained unrepledged, *i. e.* that the debtor had not found caution, or got back his goods, then the fifteen days were, according to their ancient intendment, given for repledging the goods by payment of the debt. But, in the case, where the letters of poinding proceeded merely for the purpose of execution, the fifteen days were given

given that the debtor might pay the debt, and prevent the execution altogether ; and, in this sense, these days of law continue at this moment. No poinding upon a sheriff's decree can proceed until after fifteen days, a remainder of our most ancient law still in complete preservation.

The act proceeds, ' And where the debtor has nae moveable goods but his lands, the sheriff before whom the said sum is recovered by the brieve of distrefs, shall gar sell the land to the avail of the debt, and gar pay the creditor.' This was extending the brieve of distrefs to the lands of the debtor. It was a renovation of the merchant law of Robert I. borrowed from the statutes of Edward of England. Next follows what we call a reversion in favour of the debtor, *i. e.* a power to redeem the lands so poinded and apprifed from him within seven years, by payment of the debt and all costs. The Scottish legislature did what had been done in England by a variety of acts of Parliament. In England, they extended the statute of Westminster to several other species of debts, and the courts formed several executive writs upon the model of it. The act of James III. in the same manner extends the brieve of distrefs to lands, upon the model of the act of Robert Bruce, but it holds a middle course. Our ancient execution against lands lay upon the statute of Alexander II. whereby the sheriff was authorised to sell them for payment of the debt. The act of Robert Bruce respected only merchants debts ; and, like the *elegit* of the English statute, it gave the possession, not the property of the lands in payment. The act of James III. had chiefly in view the relief of the tenants from the monstrous abuse of the brieve of distrefs ; and, therefore, to leave no case in which that abuse could be renewed, it extended the new law to debts of every kind without exception. In terms of the statute of Alexander, it ordered the lands to be apprifed by inquest, and conveyed to the creditor ; and it ordered the superior to infest him. At the same time, in terms of the statutes of Edward and Robert, it put it in the power of the creditor (or,



to use the English expression, it gave him an *elegit*) to redeem his lands by payment in seven years.

From the analysis of this last statute, we have the most satisfactory reason for the words of the execution, *poinding* and *apprising* being equally applicable to land and to moveables. They were both anciently seized upon by the sheriff; they were both appraised and valued at a certain rate by neutral persons, and delivered to the creditor in payment of his debt, in the same manner as moveables are at this moment; and hence the execution against the land itself, was the substantial, the capital species of poinding in the law of Scotland. The same analysis has demonstrated, that the law of Scotland and England, in the time of James III. differed only in a very few circumstances.

Lord Stair, M'Kenzie, and other authors, have greatly misapprehended this statute of James III. They have confounded the poinding upon the brieve of distress, which was merely personal, with the other species of that diligence, we mean, the poinding of landlords for their rents and duties, and the poinding of the ground by real creditors. These authors stand corrected by Lord Kaimes as to this particular. Neither the brieve of distress, or acts of Parliament, had any concern with these kinds of poindings. Our judges, however, from the principle of the act, humanity to tenants, were pleased to correct the rigours of the other poindings upon the model of this statute; the particulars we will afterwards learn in their proper place.

From the after course of our statutes, it appears, that the sheriffs of Scotland continued, in their judicial capacity, to possess a complete cumulative jurisdiction with the other judges in the same rank in the kingdom; and, in place of being limited, the subjects were ordered by statute to bring all their actions before the judges ordinary, in the first place, reserving to the King and his council the power of controuling their decrees, and correcting such as were erroneous either in law or in equity. With regard to their ministerial powers, they

they were also further confirmed to them. By the 30th act of the 3d Parliament of James IV. anno 1491, the sheriffs and other judges are ordered to execute all decrees; and, for that purpose, letters are appointed to be written to them. By the execution mentioned in this act, is meant poinding of goods and lands alone; and therefore the sheriff is thereby ordered to have for his office and fees ' 12 ' pennies of ilk pound swa recovered, to be taken of the party that ' the said decreet is given against; ' and, in case the sheriff does not make the parties pay, after the form of the King's letters, within twenty days, he is to be punished by the loss of his office, and condemned in payment of the debt himself. This is the origin of the sheriff fees in poinding; it took place both in moveables and heritage, which came to be distinguished by the words *poinding* and *apprising*. No other rule is yet established in execution against moveables. It is strange that M'Kenzie should declare this act to be indefuete. We maintain that it is in force at this moment. The King's letters are, indeed, executed by sheriffs in that part; but no man can doubt, that any sheriff is entitled to exercise that office. Practice has dispensed with his execution of the poinding; but he may certainly do it if he pleases; and, of consequence, he would be entitled to demand the fee which the sheriff in that part now receives. The twenty days allowed by this act to the sheriff, are the fifteen upon which it behoved the debtor to be charged, and five more allowed to the sheriff himself to execute the business. Thus, in the same manner, the sheriff in the English writ of *Fieri facias* is ordered to return the money to court in three weeks. This circumstance of the twenty days, which Sir George M'Kenzie so quickly passes over, explains another material point of our present practice. The brieve of distress, and the statute of James III. perfectly explained the fifteen days of the charge necessary upon the decrees of sheriffs; and here we have the origin of the same *induciae* upon the decrees of the supreme court. This act relates to the decrees given at justice auries, or circuit courts, as they are now termed; and the

King's letters for that purpose were directed to the sheriff upon twenty days, which was the old *induciae* of fifteen to the party, and five to the sheriff himself. The capital difference between the execution of the Scottish and English writs still continued ; we mean, that of the latter returning the writ, or immediately accounting to the superior court for the execution of his duty ; whereas the former paid the debt, or applied the proceeds of the execution himself. In this and the preceding reigns, remedies are introduced for the correction of this and other inferior judges. By the 103d act of the 14th Parliament of James III. the justiciar is ordered to hold an assize upon the sheriff in the last day of the aire or circuit, in order to try complaints against him in the execution of his duty, and to punish him if the complaint be proved. By the last mentioned act, the sheriff, in default of the execution of a decree, is rendered answerable to the party for the debt, which was a very effectual remedy.

About this period, it appears, that they began to use freedom with the brieves of the Chancery, and to devise letters suited to particular occasions, in their place, which was endeavoured to be corrected by c. 24. of the 3d Parliament of James IV. anno 1491. In place of the Lords of Session, a court of daily council was appointed to sit constantly at Edinburgh, by the 58th act of the 6th Parliament of the same Prince. By this time sheriffs, from the increase of business, had become tired of that part of their duty, which consisted in executing decrees by poinding. They appointed deputies to officiate for them in that department ; and creditors, dissatisfied with their conduct, obtained letters directed to people of their own nomination, under the title of *vicecomitibus in hac parte*, a title borrowed from the practice of the churchmen. The fees of these new ministerial officers were disputed ; and, therefore, to put the matter out of doubt, they were fixed to twelve pennies in the pound of the sums recovered, by an act in the 6th Parliament of James IV. c. 66.

This

This is the first statute in which we meet with those respectable characters *the sheriffs in that part*; and, to this relaxation of the law, in dispensing with the ministerial duty of the real sheriffs, in accepting in their place the partial services of hirelings, is to be attributed the total corruption which ensued in the execution of the law of Scotland both against moveables and land. The law of England retained, and at this moment retains over us a determined superiority in these particulars, by a firm adherence to their ancient regulations. This great barrier being entirely broke down, we shall find the difference in our practice of the execution against moveables grow wider at every step.

The next act of Parliament to be found upon this subject is c. 98. of the 7th Parliament of James IV. anno 1509. It is in these words: *Item*, 'It is statued and ordained, that, in time to come, na manner of scheriff nor officear poind nor distrenzie the oxen, horse, nor other gudes pertaining to the pleuch, and that labouris the ground the time of labouring the samin, quhair ony other gudes or land are to be apprised or poinded, according to the common law.' This act is extremely curious, and requires explanation. By the common law of England, no landlord or proprietor could take the plough, or the cattle employed in the plough, as a distress for his rents and duties, because it prevented the vassal or tenant from payment or performance of the very rents and duties for which the compulitor by distress was intended. But, as common debts had no connection with the lands, the *Fieri facias* paid no respect to these articles. The sheriff was to make money of every moveable belonging to the debtor, his body clothes excepted. The writ of *elegit*, however, proceeding upon the statute of Westminster, in appointing the goods and land of the debtor to be delivered to the creditor, excepted the oxen and horses of the plough. 'Praeterea boves et affros de caruca,' are the words of the writ; and the reason was, that the seizure of these cattle would have prevented the debtor from the cultivation of the remainder of his lands, one half of which only could,

by that execution, be delivered to the sheriff. Hence, in the Scottish brieve of distress, while it extended only to moveables, no exception was made of the beasts of the plough; it was no other than the English *Fieri facias*; and therefore the seizure was thereby authorised of the whole cattle belonging to the husbandmen. The act of James III. which extended our brieve of distress to lands, omitted the exception in the English writ; and this omission was supplied by the statute of his son James IV. now under consideration. In doing this, however, our legislature seems to have totally forgot the ancient distinction of the common law, although it seems only declaratory of it. This shows us that our old practice, or common law, had been the same as in England, in the matter of distress by landlords. The act indeed provides, that the ploughs were to be excepted in the time of labouring only, whereas the law of England contains no such speciality. By this time the French laws were pouring in upon us; and, from our act losing sight of the distinction of the English common law, it is pretty plain that the idea of the statute was taken from the French. By the ancient law of France, it is provided, 'That no inhabitant shall be aggrieved in his arms, horses, oxen, or other beasts used for the plough, by their being distrained, except they have no other goods.' This peculiarity, *except they have no other goods*, is not to be found in the English statutes, but makes a part of our act of Parliament, and therefore gives another certain indication of the source from which we derived it. The custom of France is the same at this moment, as are the laws of several other nations on the continent.

This act ordains, 'That na manner of sheriff-officear poind the oxen, horse, or plough.' This shows, that, by this time, there were different kinds of sheriffs, by appointment of other officers in their place. These new ministerial officers could not be appointed by the judges ordinary themselves, and therefore must, without doubt, have been constituted by letters from the King or the superior courts, for the particular and limited purpose of executing their decrees.

decrees. From various circumstances appearing from our statutes, it is certain, that these letters or brieves were not at first granted of course. Particular reasons were assigned for obtaining them, generally founded upon relationship, feuds, delays, or other suspicions against the judge ordinary; and the names of the sheriff or sheriffs in that part were always filled up in the letters. Other reasons, however, brought these delegations to be granted of course, viz. the neglect of the sheriffs themselves, and the uncertainty of the debtor's residence, the common method of eluding justice by flying, and removing their effects from place to place. Upon this account it was, that the brieve of distress was directed to all sheriffs and judges ordinary. Now, as the business must have been a novelty in each jurisdiction, it was pretended to be more effectually done by sheriffs in that part, who understood the nature of the affair, set it on foot, and followed it to a conclusion. Upon this account it is, that, in the writs of outlawry in England, certain commissioners are added *nominatim* to the sheriffs, who may, without interruption, continue the pursuit of the rebel and his effects. In this manner it was, that the ministerial part of the office of the Scottish sheriffs came to be divided from their other duties; nay, we may say, in a manner wholly transferred to people of little credit or consequence, suggested by creditors themselves, and named in the King's brieves and letters.

The same period of time is likewise remarkable for another very great change in the ancient law of Scotland, whereby it was made to deviate still more from the ancient practice, we mean, the change of our original brieves for letters under the Signet, and for precepts of the inferior judges. This remarkable and important alteration, by which a new face and a new language came to be given to the business of our northern part of the island, took place in this manner. The unsettled situation of our supreme courts, and the varieties which they had undergone for some preceding reigns, unavoidably threw the greatest part of the civil business, and particularly the complaints of the malversation of several judges ordinary, upon the  
King

King himself, his Chancellor, and Council, who exercised the supreme judicative powers of the nation, and determined either by law or equity, as to them seemed proper. The other courts instituted in the course of this and the preceding reigns, such as the Lords of Council, the Lords of Session, the Justices of Aire, or Assize, &c. all acted by the authority of briefes issued from the Scottish Chancery, in the same manner as the Judges of the King's Bench and Common Pleas then did, and still do in England. But the Chancery is the King's Court, where he is supposed to be personally present: Therefore no suit is brought in Chancery by a breve; because it would be absurd for his Majesty to command himself, or his Chancellor, the same as himself. From the Chancery, therefore, writs issue in the King's name, and by authority of the Chancellor. In the same manner, no breve could issue from our Chancery to the King and Council; he therefore issued his commands by letters under his own signet, in the management of the Chancellor. This mode of government, so easy and expeditious, was imported from France; and, accordingly, in the reign of James IV. and V. we find the King's letters to be a remedy at hand, always ready to be directed upon every occasion. By the 9th act of the 4th Parliament of James V. anno 1535, made against people excommunicated by the church, it is provided, 'That the party at  
' whaes instance the persons are cursed, shall have our Sovereign  
' Lord's letters to poind, apprise, and distrenzie their gudes, move-  
' able and unmoveable, for payment of the sums for which they lay  
' under the said sentence.' Here, for the first time, we find warrants of poinding and apprising given by letters from the King, in execution of an ecclesiastical sentence, quite different from the breve of distreis, and different from the act of James III. though the letters must have been executed in terms of that statute.

By this time we see clearly in what manner letters of poinding multiplied. When a decree was obtained before an inferior judge, the party, in order to reach the debtor in every jurisdiction, applied  
to

to the superior court for *letters conform* ; a title directly borrowed from the French practice, and, in several cases, preserved by Balfour. In the 1532, we find, that, notwithstanding the new practice of naming sheriffs in that part, parties were entitled to have their letters addressed to the real sheriff, steward, or bailie, if they pleased. ' And (says Balfour) if the said sheriff, judge, or bailie, being required to that effect, refusis or neglects to do the samin, he aught and ' sould make payment of the debt himself \*.'

In a little time after, a model of an entire new court, the College of Justice, was brought to James V. and by him established, taken from that of the Parliament of Paris. In this Court were reunited the whole jurisdiction and powers belonging to the King's former courts of law, and also the supreme power, in civil cases, executed by the King and his Council. For that purpose, the Chancellor was made President ; and the Clerks of the King's Signet, who formerly acted under the Chancellor alone, were made members of the Court. After this, brieves could no more be directed to this supreme Court, than they could formerly have been to the King, his Chancellor, and his Council. The Chancellor of both kingdoms had the government of the Chancery, and its writs particularly committed to him ; but, being now President of the College of Justice, he could not order a brieve to be directed to himself. Every thing thenceforth fell from the old Chancery into the department of the Clerks to the Signet, and passed under the King's seal, in the same form as was observed in the Chancery of France and of England. For this reason, there is at the present moment very little difference between the form of our signet letters, and the form of the writs issued by the English Court of Chancery, in exercise of its equitable powers. The College of Justice was instituted by statute in May 1537. The principal part of the old business of the Chaucery directly ceased, and summonses came in place of brieves. These brieves contained a long *induciae* of forty days, and were attended with

\* P. 392. c. 27.



with several dilatory circumstances in point of form. For this reason, James V. in the 1540, three years after the institution of the College of Justice, in order to extend the reform to the sheriff and other inferior courts, procured the act 72. of his 6<sup>th</sup> Parliament, ordaining all their precepts to be directed upon fifteen days. The tenor of this act is clear and express, perfectly accounting for this change in the constitution of our inferior courts. Thus the old brieves to the sheriff were dispensed with by special statute, as those directed to the superior courts fell by the coalition of the whole judicative power in the College of Justice. The Chancery dues, by this last act, were saved to the parties; the long *induciae* of forty days were limited to fifteen; and the sheriff's precept or summons was substituted in place of the former brieve, notwithstanding (as the act expresses it) 'of the old laws and constitutions made of before.' At the same time it is declared, that this reform respects personal actions only, and that all other matters and actions are to continue to have 'sic process as they have had in times bygone.' This last clause is of the utmost importance, and accounts for the subsistence of the remaining brieves which still continue to be issued from the Chancery to the sheriff, and executed by him after the ancient form.

There was, at this period, no diligence competent for payment of liquid debts but letters of poinding and apprising against moveables and land, founded upon the act 1649, which did nothing more than new model or improve the ancient brieve of distress, by limiting its effects against tenants, and extending it against the land of the debtor. When we say, that there was no executorial but poinding, we except the captions upon the decrees of the church, and the letters of four forms or harning *ad facta praeſtanda*. By this time, decrees of registration upon consent had become a part of our practice; but, by consenting that letters should pass, letters of poinding were only intended. These words, however, included the poinding both of moveables and land; for these two things very often went together

together in the same warrant. ' Letters of poinding (says Balfour) ' allanarly should be direct for execution of ane contract made be- ' twixt twa parties, contenand liquidat soumis, beand registrat in the ' buikes of ony judge, with provision thereuntill, that letters pass ' thereon in form as effeiris.' For this he quotes a decision, 14th December 1570.

The brieve of distrefs, and the mode of applying for letters directed to the particular sheriffs, in terms of the act of James III. being now entirely out of use, these usages were supplied by citing the party against whom an inferior decree had been obtained, before the College of Justice, according to the practice of France and its Parliaments, and obtaining a new decree, conform to, or in the terms of that pronounced by the sheriff; after which, letters were issued under the Signet, in the same manner as if the judgment had been originally pronounced by the supreme Court.

The goods and lands of debtors, were pointed either in virtue of letters proceeding from the supreme court; in virtue of precepts of sheriffs, and other inferior judges within their own jurisdictions; or in virtue of decrees conform, granted in the manner just mentioned. These decrees conform were very tedious and expensive; and, therefore, by a variety of posterior statutes, which we formerly considered, they were in a manner discharged, and letters of horning appointed to be directed by the Lords, upon production of the decree or precept of sheriffs, commissaries, &c. duly executed. A palpable omission in these acts gave rise to a singularity in practice now almost forgotten, but necessary in the history of our forms. In all the statutes, horning was ordained to be granted upon the inferior decrees, but nothing was said of poinding; while, at the same time, the decrees conform, formerly in use, were in a manner discharged. The consequence was, that poinding could only proceed upon the precept of the inferior judge; so that, if the debtor removed his effects out of the jurisdiction, the law afforded no diligence to reach them. This defect was allowed to continue till the 12th of June

1649, one of those termed *rebellious* Parliaments, when, by act 7. of that year, letters of poinding were ordered to be direct by deliverance to the Lords, in the same manner as letters of horning. This act received immediate obedience; it was rescinded at the Restoration, but re-enacted by c. 29. of the first Parliament of Charles II. anno 1661. By these statutes, letters of poinding and apprising, formerly granted in separate warrants, came to be joined together in one letter, called *horning* and *poinding*. Another defect in poinding, as it then stood, arose from this circumstance, that no previous charge was necessary to be given. The creditor only waited till fifteen days after the date of his decree, or registered bond; and then he executed his poinding, without giving the least notice of his intention. This was an evident remainder of the old brieve of distress. The sheriff, neither by that brieve, nor by the act of James III. was appointed to charge the debtor upon fifteen days, before poinding his property. He was to do no more, than to delay for fifteen days after the date of his decree; the purpose of which was, to give the debtor (who, by the then practice, must have been personally in court) time to repledge the goods attached, for securing obedience to the judgment, which was the first step of a common action; or to give him an opportunity of preventing further execution, by payment of the debt in that time. The same rule continued in the inferior courts, in all cases of civil debt.

When letters of horning and poinding were awarded in the same warrant, by the act 1661, the warrant for poinding was inserted after the charge of horning, and consequently, by the plain tenor of the letters, could not be executed till after the expiration of the charge; but still the poinding without a charge continued upon registered bonds and decrees of inferior courts; ‘Whereby (says Sir George M’Kenzie) noblemen and persons of quality were oftentimes poinded and affronted, and merchants surprised and ruined, before they knew that a decret was recovered against them, or their bonds registered.’

According

According to the alteration of our law and practice, this was a very great evil ; and therefore an act was made to remove it in the 2d Parliament of Charles II. anno 1669. This act does not dispense with the fifteen days, the ancient days of law ; for, before the date of the statute, it behoved these days to expire ; and it behoves them still to do so, before a horning can be applied for from the Court of Session ; and, when that horning is obtained, a new charge must be given upon fifteen days more, in the same manner as was formerly done upon decrees conform, or as it is yet done upon decrees of the Court of Session itself. The alteration made upon the decrees of the inferior courts, is, that a poinding cannot proceed upon their decrees, or upon registrations in their books, without a charge. At the same time, this charge may be given upon their precepts immediately after pronouncing the decree ; so that the fifteen days of law will, by that means, make a part of the charge ; we say, a part of the charge ; because the decree, if it is of any length, cannot be instantly extracted. The practice is therefore to take out a precept, which, without engrossing the procedure, shortly mentions that such a decree has been pronounced, and contains a warrant of poinding.

From the history we have given of inferior courts, the reason will be perceived why they never had the power of awarding diligence against the persons of debtors. The merchant law of Robert Bruce extended only to burghs. Burghs therefore alone, of all other inferior judges, remain in possession of the power of granting acts of warding against persons of debtors. At the institution of sheriffs, no other diligence subsisted but poinding against moveables. The statutes of Alexander II. and James III. extended the brieve of distress to lands. The captions which proceeded upon the decrees of the church, were given under the seal of the King and Council ; and the sheriff, in the execution, was only a ministerial officer. When the old ecclesiastical polity fell at the Reformation, the acts of Parliament provided, that letters of horning, *i. e.* execution against the

person, could only be given by deliverance of the Court of Session upon the decrees of inferior courts; and, consequently, to this moment the jurisdiction of sheriffs, stewarts, &c. does not, in any civil matter, extend to the person of the subject.

We come now to consider the style of the warrant which makes a part of our letters, called *horning* and *poinding*. ‘And siclike, that ye, in our name and authority foresaid, fence, arrest, apprise, compell, poind, and distrenzie, all and sundry the said A. B. his readiest moveable goods, gear, corns, cattle, insight plenishing, horse, nolt, sheep, debts, sums of money, and others whatsoever pertaining and belonging to him, wherever, and in whose hand the same may or can be apprehended; and, failing of moveable goods and gear poindable, that ye apprise all and sundry his lands and heritages, conform to act of Parliament, to the avail and quantity of the foresaid sums, and make the said C. D. compleatly paid thereof.’

‘*Compell, poind, and distrenzie.*’—*Poind* comes, as formerly mentioned, from the old *pound*, or inclosure, into which cattle seized upon by landlords were put, to compel payment of their rents and duties. That kind of poinding was the original of the whole process; and the language of it was made to serve for all the other species. The word *compell* is only applicable to that kind of seizure which was meant not as an execution, but as a pain to force or compell performance.—‘*Distrenzie*’ is an old Scottish Gallicism, from the ancient Latin term *distringere*, to distress; a word also belonging to the diligence against tenants and vassals.

‘*Sums of money, and others.*’—These words belong to arrestment, and not to poinding; though we cannot help here observing, that what we call *arrestment* is only a modern writ; for every thing was of old reached by the *levari facias*, and which is the reason why we find the terms here blended, in the same manner as the *Fieri* and *levari facias* were in England, which are just the Latin words for poinding and arrestment, reaching the money or effects of the debtor, wherever the same could be found.

‘*And,*

*And, failing their moveable goods, that ye apprise all and sundry their lands and heritages, conform to act of Parliament.*—The act of Parliament is that of James III. which we have so minutely explained, and which authorised the poinding of land by the same form as that of moveables. The apprisings continued in consequence of this warrant, or of separate letters of apprising, till the 1672, when they were changed for adjudications, competent only by action before the Court of Session; and thus the diligence of the law of Scotland against lands, was completely separated from that against moveables. It was entirely changed from the old footing of the brieve of distress, or the English *elegit*, to a novel form borrowed from the laws of France. Nothing remained to the sheriff, or other inferior judges, but the execution of the letters of poinding. The warrant of apprising, after the 1672, was dropped out of the style of our horning; and, in place of it, the following words were added to the warrant of poinding: *‘ Make penny thereof, to the avail and quantity foresaid, and cause the said complainer be compleatly satisfied and paid of the same.’*

Let us now consider the ceremony and mode of execution. The messenger engages two witnesses to go along with him, two apprisers, and a notary public. The attendance of the notary is a remainder of the old form, in which messengers, as acting in the place of sheriffs, were considered in the light of judges. The clerks of all the sheriffs, and other inferior courts, were notaries public; and therefore the sheriffs in that part, in pointings of any moment, chose always to have a notary, as clerk to the procedure. As a judge may act without a clerk, so a notary is not necessary in a pointing; we mean, his assistance is not essential to the validity of the process; but it is always prudent and adviseable that a notary should attend. He is an officer to whose instruments the law gives credit; and therefore it is proper that the procedure of the messenger should be supported by a regular instrument under his hands. When these unwelcome guests arrive at the dwelling of the unhappy debtor, they seize his cattle, goods, and effects of every kind, and drive and tumble

ble them together into one place. In this situation they are *pounded* and *distrenzied*; and, as an authority, the letters are publicly read with the execution of charge, to show that the act of Parliament, in that particular, has been complied with. This is particularly requisite to be done by the messenger, who not being an ordinary judge, derives all his powers from the letters in his hand. This done, he proceeds to value or apprise the goods upon the spot, which ought to be done by the appretiators of the bounds, but they seldom officiate. No such ceremony was requisite in the old poidings: Nothing was done till the goods were carried to the market cross; and there they were fairly exposed to sale, and appraised if not sold. The apprisers upon the ground are always two people in the constant employ of the messenger, and entirely at his devotion. If, however, there be common appretiators by office in the place, the messenger, at the debtor's request, would be obliged to admit them in preference to his own followers, or any other stranger; and their apprisement would be received, in case of refusal. The apprisers, whoever they are, being *designed*, (as the officers call it), the messenger mutters an oath to them about the faithful administration of their office; and then they proceed in a loose and partial manner to put what they call *fair values* upon the goods. The notary and messenger take notes of such valuation, and extend the whole into one sum.

In the next place, the messenger makes proclamation, by three oyeses, in order to convocate the people; declares the price at which the goods are appraised; and thereafter offers them to the debtor three several times, or to any other person in his name, conditionally that they pay the price to which they are appraised; with certification, that, if this is not done, the goods will be delivered at the appraised value to the creditor. No offer upon the part of the debtor being made, the goods are immediately carried to the market cross of the head burgh of the county, or other nearest jurisdiction; and there the very same ceremonies and offers are repeated, with this difference, that two other apprisers are added to the former; and, as  
these

these are likewise generally in the messenger's employ, there is a perfect agreement about the value.

Lord Kaimes expresses himself with feeling and propriety upon the above procedure. ' In letters of poinding, (says he), a blank  
' being left for the name of the messenger, the creditor is empowered to choose what messenger he pleases, and, of consequence, to  
' choose also the appraisers, by which means he is, in effect, both  
' judge and party. In a practice so irregular, what can be expected  
' but an unfair appraisement, always below the value of the goods  
' poinded? and, for grasping at this undue advantage, the creditor's  
' pretext is but too plausible, that, contrary to the nature of his  
' claim, he is forced to accept goods in lieu of money. Thus our  
' execution against moveables, in its present form, is irregular and  
' unjust in all views. Wonderful, that, contrary to the tendency of  
' all public regulations toward perfection, this should have gradually  
' declined from good to bad, and from bad to worse\* !'

These reflections of his Lordship are no less eloquent than true. Evils of the same kind followed in the apprising of land, which were remedied by the introduction of the adjudications in the 1672; but, in moveables, the abuse still continues a disgrace to the jurisprudence of Scotland. A form thus inconsistent, and teeming with absurdity, could not be the produce of law. It is the corruption of forms originally good, generated by the avarice of creditors, and the ignorance of messengers, upon whom the ministerial duty of our inferior judges totally devolved.

By the brieve of distress, the goods were to be carried by the sheriff to the market cross, and exposed to a fair sale. The only meaning of carrying them to that place, was upon account of the public market held there; and it is clear they could only be carried in a market day; for the words of the brieve bear, that they are not to be appraised but in default of sale; and that in the end of the market, before which, that circumstance could not be known. In this respect,

\* Tracts, p. 332.



respect, our brieve was exactly the *Fieri facias* of England. Our sheriff was to make money of the goods if he could ; if not, he was to deliver them to the creditor by apprisement of ' liel men of different baronies.' The English writ of *elegit*, which extended the execution for debt to lands, directed the sheriff to apprise both the land and the goods by an inquest, and to deliver them both, at an appraised value, to the creditor. This circumstance, of the goods being sold for money, or delivered by apprisement, then made, and still makes the difference between the *Fieri facias* and the *elegit*. The act of James III. in the same manner as that of Westminster, extended the brieve of distress, which was our *Fieri facias*, to lands ; and hence the reason of our apprising answering to the *elegit*. The sheriff is, by the act 1469, ordered to make the goods be appraised and delivered ; but that act says nothing of the sale of them. After the brieve of distress upon this act went out of use, letters of poinding and apprising were issued in their place ; for, without a previous poinding, or attempt to poind, no apprising could go on. The words were, ' That ye apprise, compell, poind, and distrenzie their goods ' and lands ; and, failing their moveable goods, that ye apprise their ' lands,' &c. Accordingly, it behoved the execution of this diligence to bear, that the messenger had searched for the moveable goods, in order to apprise them, before he could take a single step against the land.

When moveable effects were seized by a person who meant only to take the lands, the officers judged it safe and proper to proceed in their execution against these moveables, in the same forms that were observed in the process against the land. They dropt entirely the idea of selling the goods, but proceeded to apprise and deliver them at the appraised value, exactly as they did in England upon the *elegit*. Now, let us see in what manner the land was poinded. We find, by the form preserved by Dallas, that the first thing the officer did, was to go to the ground of the land ; and there he made open proclamation by three several oyeses ; after which he denounced the lands  
to

to be apprised against such a day. In the same manner, in the poiding of moveables, the messenger goes to the spot, collects the goods, makes proclamation, reads the letters, and declares that he has poided these effects. From the ground, the messenger, in apprising of land, went to the market cross, and there he repeated the same ceremony. He denounced and warned the parties, that, unless they paid the debt, the lands would be apprised against such a day. In the poiding of moveables, the very same thing is done; the messenger declares, that, if the money be not paid, he will deliver the goods to the creditor. When the day for apprising comes, the inquest is called; and the value being by them fixed, the judge (says St Martin \*) 'causes offer the land thrice at the door to the parties, or any in their name who will come and buy them, for payment of the sums for which they are apprised; with certification, that the lands will be adjudged to pertain to the creditor; and none appearing, the judge assigns the land to the procurator for the pursuer, in terms of the act of Parliament.' It behoved this ceremony to proceed within the tolbooth of the head burgh of the shire, if that circumstance did not happen to be specially dispensed with.

The process in moveables is thus. The messenger goes to the market cross, calls his apprisers, values the goods, and makes offer of them to the debtor, or any in his name, at the prices put upon them; and, if nobody appears, they are, as the lands were, assigned to the creditor. In these processes, there are only two circumstances of difference which we are able clearly to account for. The first is, the appretiation upon the ground of the lands, before going to the market cross; which is an absurdity, occasioned by the following occurrences. In small poidings, and in the case of particular persons, the carriage to market cross was found inconvenient and expensive, particularly in poidings for minister's stipends; and there-

\* P. 29.

fore an act was made in the rescinded Parliament 1649, and afterwards re-enacted by c. 21. 1663. The words are: ' Therefore  
 ' his Majesty, with advice and consent of the estates of Parliament,  
 ' declares, that it shall be sufficient to the ministers foresaid, in  
 ' poinding, apprising, and distrenzieing of goods of persons deficient  
 ' in payment of their rents and stipends, to comprise the said goods  
 ' by honest sworn men, upon the ground of the lands and place  
 ' where the goods are, which shall be as sufficient as the same were  
 ' done at the said market cross.' The same privilege was afterwards  
 extended to a great variety of different kinds of poindings, such as  
 for the excise, King's rents, annuity, &c. &c. So that this method  
 of apprising upon the ground, from its frequent repetition, came, by  
 the ignorance of messengers, to be thought necessary in all poindings.  
 However these statutes shortened the particular species mentioned,  
 they doubled the ceremony in other common poindings. This would  
 have been lucky, had the defects of the diligence been in any cir-  
 cumstance corrected; but doubling the ceremony served only to  
 double the absurdity and expence.

In this manner was our execution against moveables confounded  
 with that against land. Every step in the process of apprising of  
 land had an obvious and sensible intendment. The denuncia-  
 tions upon the ground, and at the market cross, were indispen-  
 sibly necessary, to warn the debtor of the apprising of his lands,  
 which was the mode prescribed by the act of Parliament. No sale  
 took place; and therefore they could only be offered to the debtor  
 himself, upon payment of the debt; for no third party was entitled  
 to interpose. Now, when this is applied to moveables, the dili-  
 gence becomes absurd, and attended with consequences the most un-  
 just and inconsistent imaginable. We shall now notice the other  
 circumstance in which the form differed. The messenger in the  
 poinding offers back the goods to the party, not for payment of the  
 debt, but for payment of the prices at which they are valued; and  
 lawyers were not long of discovering, that if the debtor, or any  
 body

body for him, paid the money, in case such payment was not equal to the debt, the messenger had nothing to do but to poind them over again. No offer of this kind is ever made ; and therefore the whole ceremony of poinding is perfectly devoid of meaning. It resolves just into this, that a creditor, in consequence of a warrant of poinding, can put any value he pleases upon the goods of his debtor, and appropriate them to himself by a piece of senseless form, managed by the dregs of the people.

Lord Bankton says, ‘ That he apprehends that the terms of the offer to the debtor ought to be, that he shall have the goods upon his relieving them by payment of the debt ; for otherwise, if he should take the goods at the appraised value, and the debt not be thereby satisfied, the messenger might presently anew distrain them for what is owing ; and it is plain, the intent of the offer to the debtor is, that he may relieve the goods, which, by the messenger’s seizing and appraising, becomes a *pignus praetorium*, or judicial pledge \*.’ His Lordship, in this place, confounds the execution against land with that against moveables. The lands by the appraising, no doubt, do become a *pignus praetorium* ; but the property of the moveables is instantly altered. The messenger, by the very next word he pronounces, assigns them to the creditor ; to whom, by the law, they from that moment belong, without redemption. The wrong in the procedure arises from the very circumstance of applying the form proper to land, to moveables, which are absolutely taken in execution ; and, so much did the avarice of creditors induce them to take advantage of this error, that, in a case reported by Durie, a creditor insisted upon taking goods at his own appraisement, although the debtor offered higher values upon the spot. This is the only instance of such an offer in the records of Court ; but the Lords most justly found, that the offer of the debtor ought to have been accepted †. This offer by the messenger has always been not

3 1 2

for

\* Vol. 3. p. 27.

† 23d Feb. 1628, Gage against Guthrie.

for payment of the debt, but for the prices fixed by the appretiators ; and we shall now show in what manner this palpable inconsistency established itself in the form of poinding. When the creditor's object was to apprise lands for his debt, he took out letters of poinding or apprising, in the style of which the moveable goods were slightly mentioned. But, when the object was the moveables, the creditor took out letters of poinding *per se*, the style of which was much more particular, viz. ' All and sundry the said A. B. his ' readiest goods, gear, corns, catle, insight plenishing, horse, nolt, ' sheep, and others whatsoever pertaining or belonging to him, ' make penny thereof, and cause the said complainer be completely ' satisfied and paid.' When letters of poinding were warranted to be issued at the same time with the horning, the Writers, taking advantage of that expression, added a warrant for apprising of the lands also \*. They left out the words '*make penny thereof*;' but, after the act 1672, when apprisings were abolished, the clause respecting the land was omitted, and these old essential words of the poinding restored ; and so the style continues at this moment. It made, however, no alteration in the practice ; the messengers persisted in their old way to apprise moveables, in the form of the act of James III. in the same manner as they did the land ; and so the absurdity has been continued to our own time.

If we look back to the English process in the same business, it will at once point out in what manner they have avoided the unpardonable errors into which we have fallen. The act 1672, abolishing adjudications, returned to our warrant of poinding the effect of the *Fieri facias*. The Writers to the Signet altered the style, and yet it had no effect in correcting the practice. From that time, *i. e.* the 1672, the goods poinded ought to have been fairly exposed to sale, in terms of the old brieve of distress, at a public market ; and they ought to have been delivered to any person who offered

\* Vide Dallas's Styles, p. 8. & 9.

viz. a fair sale of the goods at the market cross, which would have restored sense and meaning to the diligence : For what is the purpose of removing the goods from the spot, if they are only to be offered to the debtor, and poinded again upon his acceptance of that offer ? What is the use of the proclamation, or the words of the warrant requiring the effects to be converted into money ? All these circumstances concur in proving, that the present form is nothing more than an ignorant corruption of our original execution.

Struck by the imperfection of the diligence of poinding, the Court of Session, in the 1754, made an act of Sederunt, ordaining all officers, executors of poindings, to report their execution within forty-eight hours to the sheriff of the county, that he may give directions for a fair and public sale of the goods. That act of Sederunt unluckily embraced too great a variety of objects ; it contained regulations for reducing the diligence of creditors to an equal, or *pari passu*, division of the debtor's effects ; and, as the consequences of such a considerable alteration in the common law could not be foreseen, it was cautiously made a temporary act, to continue no longer in force than the 20th of August 1758. The variety of its objects did not answer, in practice, what they promised in theory ; and therefore it was allowed to expire. Had it related to poinding of land, the regulations introduced would, in all probability, have answered the purposes intended by our judges.

The English distress by landlords for their rents, besides plough-goods and the cattle, admits a great variety of exceptions. The reason was, that such distress is not an execution, but a mode of compelling payment of their rent. The *Fieri facias*, on the other hand, for personal debts, reaches to every thing belonging to the debtor, his body clothes excepted. In the same manner, our poinding is without any other limitation but that of the plough-goods and cattle, in terms of the act 1503, formerly mentioned. This act, however, protects these articles only in the time of labour, and fixes no certain part of the year. Our judges, therefore, have de-  
fined

fixed it to be 'the time in which the tenant is actually employed in 'ploughing.' If the tenant's work is done, against whom the diligence is directed, it matters not that his neighbours are still at labour; and, though the neighbours have given over, if the debtor's work be not finished, the law will continue to protect him. This ploughing, however, is restricted to the year's crop without fallowing, otherwise the diligence might be excluded for the greatest part of the season. The statute is, in fact, of very little use, because it protects the labourer only, who has other goods to poind, preventing the messenger from the arbitrary seizure of the plough goods and cattle, because the want of them would occasion the heavy consequential loss of his year's crop. But, if there be no moveables, or if they be not sufficient to satisfy the debt, it has been found that the messenger may lawfully proceed\*.

In this matter the laws of France are much more humane than those either of England or Scotland. They protect the plough-goods, cattle, and labouring instruments, even against the King's duties, except for the rent of the farm, and for the price of these articles themselves. They also discharge the seizure of the debtor's clothes, and the bed he lies on, together with the arms, horses, and warlike equipage of officers and soldiers. Nay, what is truly benevolent, creditors in rural poindings are obliged to leave a cow, three sheep, and two goats, for the sustenance of the debtor's family, unless the debt be for the price of these very articles.

The property of moveables is presumed from being found in the debtor's possession; and therefore the messenger may, by our practice, seize the whole. If a third party appears, and offers to make oath that the goods, or any part of them, belong to him, the officer, in consequence of his judicative authority, is bound to receive the oath; but, before doing this, he is allowed to put special interrogatories to the claimant, in order to a discovery of the fact. If, in consequence

\* Home, March 1681, Goodfirc.

consequence of this investigation, the claim appears to be false or collusive, the messenger may reject it, and proceed. The claimant protests for damages, and brings an ordinary action both against the messenger and his employer, for recovery; but, if the party produces a written title to the goods, and offers to fortify that title by an oath of verity, the officer must stop, and yield up the articles claimed; it being hitherto understood, that his judicial power does not reach to the cognisance of written conveyances; and, upon these occasions, it is his duty to protest against the claimant for payment of the debt, and damages. We should also think it prudent, upon such an occasion, to make the notary to the poinding take a proper copy of the conveyance produced, or to insist upon the consignment of it in the hands of the nearest judge, to prevent posterior alterations. If it be a writing obviously defective in the statutory solemnities, it is imagined that the messenger would be entitled to proceed; at any rate, it is his business to report the *res gesta* in his execution. It is prudent in the claimant to allow the goods to be fully apprised before he makes his demand, otherwise the value remains uncertain; and, if the obstruction be afterwards found improper, the claimant will be subjected in the same manner as if he had deforced the messenger, there being no difference to the poinder between force and fraud\*. But, if the poinding be suffered to be completed before the claim be made, the goods must be recovered by an ordinary action. Formerly, the oaths of the debtor's wife and children were admitted in the absence of the proprietor of the goods, but they are now refused. A common action is the only remedy. The oaths given by the claimants, upon these occasions, have no effect upon the point of right; they are no more than oaths of credulity, which may be redargued by every habile mode of proof, in a posterior action for that purpose. The English sheriff, when claims of this kind are made upon him, calls an inquest, which is termed *de bene esse*, and regulates himself by their verdict.

The

\* Edgar, June 10. 1724, Gordon.



The last regulation in the affair, is that of the 12th of his present Majesty, c. 47. intended, like the former act of Sederunt, to remedy the evils attending upon insolvency, which obliged the creditor poining to deliver the goods to a factor appointed by the Court of Session, in case the effects of the debtor be sequestrated in thirty days from the date of the poining. This statute put an end to three fourths of that kind of diligence in this country, and altered the compulsitors of the law from execution against the moveables, to that against the person. Like the former act, it has fallen entirely short of its purpose. Even with respect to poining, the last act committed a very great oversight; it provided that the creditor should only be bound to deliver the goods; or, if sold, to account for the appraised values; whereas it ought to have adhered to the old remedy of appointing the goods to be fairly sold at the sight of the sheriff; for many creditors have availed themselves of unjust appropriations, and, by sudden pretended sales, gained great advantages over other persons concerned.

Growing corns, or other goods not transportable, are pointed by samples. The property is thereby transferred, and the quantity and price remain to be fixed before separation from the ground. The creditor is bound to do this regularly before intromitting, otherwise he is liable in the consequence of a *spuilzie*; and he must be careful to complete the business, by ascertaining the extent in proper time. If he neglects this, a second poining will put him out. At the same time, a creditor, who either does point by samples, or is ready to do so, is in safety to make a purchase from the debtor, and will thereby exclude posterior creditors whose diligences were not ready. The safest way in such a case, is to proceed in the poining as far as it can be done; and then to make the purchase by written agreement, expressing every circumstance of the facts. The quantities and prices, when the execution proceeds in the common manner, must be fixed by threshers, casters, and measurers; all

of whom must be sworn to a faithful execution of the work, and the execution ought distinctly to narrate the procedure.

If the debtor appears at any period of the execution, and offers to pay the debt, the poincing must stop, and a proper time be allowed for making out a discharge. If the creditor is not present to grant such discharge, the debtor, if he pleases, may pay the money to the messenger, upon his receipt and delivery of the diligence. But, as the messenger has no special authority to receive it, the payment to him is no more than a consignation upon the peril of the configner; and therefore the proper and safe method is, to consign the money in the hands of the nearest judge ordinary, or his clerk; upon which the goods must be redelivered to the debtor, and the *res gesta* narrated in the messenger's execution, the debtor, at the same time, taking instruments in the hands of the notary to the poincing. Lord Stair says, that the execution of the messenger, in this case, together with a proper discharge produced to the Lord Ordinary on the bills, will be sufficient ground for a summary charge against the configner to pay the money to the creditor.

An illegal poincing is, in law, held to be a *spuilzie*, the form of procedure in which belongs to a title distinct from this subject.

*Letters*

*Letters of Open Doors.*

**I**N the discourse upon the execution against the person of the debtor, we had occasion to show the high degree of respect which the Roman code, and the ancient law of this island, paid to the dwelling-houses of individuals. We mentioned, that our neighbours in England have maintained this privilege, so consonant to the manners of a free people ; and we pointed out in what manner it was lost to the inhabitants of this country, by the abuse of the process of outlawry, in making rebellion to the Prince the established penalty of non-payment of civil debts.

If the house of a subject, by the ancient law, could not be violated by the forcible execution of any process against the person, far less could an attack by force be made upon it in the lower execution against moveables. The sheriff, by the English poinding, or *Fieri facias*, is indemnified as far as he acts necessarily, in order to the taking of the goods: ‘And, therefore, (says Baron Gilbert), if he break open a chest, in which goods are locked up, or a barn not adjoining to a dwelling-house, which is made for the conservation of goods only, he is indemnified by the writ; but he is not by the writ authorised to break the dwelling-house, which is built for the protection of the man and his family\*.’—‘This protecting a man in his own house, (continues the Baron), was very agreeable to the ancient law; because, in personal contracts, they did only

\* Law of Executions, p. 18.

‘ subject their chattels, and not their persons, nor their freeholds ;  
‘ and though afterwards, by subsequent laws, the freehold and per-  
‘ son were made liable to execution, yet they have not taken away  
‘ the privilege a man had by common law to defend his own house,  
‘ which still continues.’

The principles and practice of our own ancient law were the very same. There is not a vestige in our old statutes which indicates the existence of any authority in the sheriff, or any officer, to enter a man's house upon any pretence, but that of a crime committed by the owner, and of the fictitious crime, which afterwards became so prevalent, of civil rebellion. Of this we have a certain proof, from the necessity which exists at this moment of obtaining what we call *Letters of Open Doors*, in all cases where access is denied, and where the messenger is not possessed of a caption against the party. The nature of this arbitrary warrant betrays, of itself, the unlucky quarter from whence we unhappily derived it, and many other customs contrary to the genius of our own law, and to the manners of a free people. We formerly observed, that, after the institution of the College of Justice, a swarm of new letters and new warrants appeared under the Signet, altogether unknown to our ancestors ; till at last this practice descended so low, that the Writers framed letters suited almost to every incident of their employers business. In Balfour's system of the law, there is no indication of letters of open doors ; but, in the 1541, which was immediately after the Institution of the College of Justice, we find letters directed, charging the threshers of the adjacent country to pass and thresh out pointed corns, at the request of the officer executor of the poinding, upon the debtor's expences \*. If the messengers were thus easily accommodated with incidental warrants, it might be safely conjectured, that they would very soon come to apply for letters to break open doors, and enter houses by force ; and our judges, whose forms were now modelled  
upon

\* Balfour, p. 389. c. 19.

upon those of France, had a plain authority for their direction. In that kingdom, the warrant of poinding is totally committed to an officer, *huissier*, or door-keeper of court, much in the same station and degree of knowledge or respect as our messengers. ' When the ' doors of a house are shut, and access denied, the officer (say the ' French lawyers) ought to make his verbal process upon the fact, ' and to apply to the nearest judge of the jurisdiction, who, upon ' examining the verbal process, will authorise him by a warrant to ' break open the doors, in presence of two witnesses, whom the ' judge at the same time names \*.' In Paris, there is an officer appointed for this special purpose, called *the commissary of open doors*.

After the whole executive business of this nation fell from the hands of the real sheriffs into those of messengers, or sheriffs in that part, it became a necessary axiom in the law, that these officers were limited to the strict words of the warrant upon which they acted. When, therefore, a messenger acted upon letters of poinding *per se*, he could not enter any house, if the doors were shut against him, and ought never to have done so. According to the French method, he returned an execution of the fact, which being produced with the letters of poinding, the Lords, upon a bill, granted new letters of poinding, with an addition of a warrant for breaking open the doors of the debtor's house by force, in order to carry off the whole furniture, or other effects found in it. The style of these letters will be found in our formalist Mr Dallas †. There is nothing material to be remarked relative to the style of this diligence, as it is merely composed of the letters of poinding, and the warrant of open doors commonly inserted in letters of caption, which have both been already analysed. In the preamble, indeed, the debt and the letters of horning are recited; and it concludes with a short narrative of the messenger's having found the doors shut, or repositories locked, whereby he was prevented from putting his letters of poinding into

\* Encyclopedie;—vide Saissie.

† P. 70.

into complete execution. The Writers of the last century, when they gave a warrant for poinding moveables, always added to it a warrant for apprising the land, both of them being founded upon the act of James III. 1649. These letters were almost necessary in every case, before the horning and poinding were joined together in one warrant; but, after that time, a trick of practice rendered the letters of open doors seldom requisite. The messengers took care to be possessed of captions before attempting to execute the poinding; and, if the doors were closed, they forced them open, under the pretence of searching for the debtor or rebel, upon the authority of the warrant in the caption. Having, under this pretence, got admission, they poinded the effects. Nay, from several style-books in the last century, we find, that diligence against any other person was made use of for this purpose, the messenger pretending that the man against whom he had the caption was in such a house. All mean devices of this kind ought to be discouraged; they corrupt the officers, and tend to debase the people. We do not know if this trick be ever put in practice; but, we apprehend, no messenger is entitled to enter a house in virtue of a caption against a third party, unless he can show a special information to that purpose; and, if he refuses to give satisfaction upon this head, he may be resisted, and ought to be punished. Where the caption applies to the debtor whose effects are to be poinded, there is no remedy; the device always has, and will continue to take effect. The only cases now in which letters of open doors are necessary, are where a poinding is attempted upon the warrant in a horning, without having raised a caption; and the other and most frequent is, in fortification of the decrees of sheriffs and other inferior judges. When doors were closed against their precepts, the old practice was always to apply to the Court of Session for a warrant of open doors; because it was long and justly doubted, whether sheriffs or other inferior judges possessed such a degree of power as to authorise the commission of violence upon the house of any subject. In our formalist's time, it  
was

was thought they could not do it. ' The messenger or officer comes  
' to poind, (says he), and yet cannot, there being no patent doors,  
' or warrant to make any ; and so they must return *re infecta* ; nor  
' is it in the power of an inferior judge to grant such warrants.'  
Therefore the style given by Mr Dallas is in supplement of a sher-  
riff's precept. His idea is certainly consonant to our ancient law,  
which trusted no inferior judge with such formidable powers. Du-  
rie, however, has reported a decision \*, in which it seems to be a-  
greed on all hands, that magistrates had authority to grant a warrant  
for open doors, in supporting the execution of their own precepts of  
poinding ; and, since the beginning of this century, it is certain  
that sheriffs, stewarts, and bailies, have been in the daily practice of  
granting warrants of open doors, upon returns of their own officers ;  
which we, with great submission, take to be a very culpable incroach-  
ment of these judges upon the law of the country, and the rights of  
the people. In June 1748, a Writer to the Signet, with great pro-  
priety, refused to subscribe letters of open doors, upon the decree of  
a baron in the execution of his office. Upon report of the case, the  
Lords directed the Ordinary to refuse the bill ; for this reason, be-  
cause they could not interpose where there had been no interposi-  
tion of the sheriff's authority to the baron's decree. The reason of  
this was, that the sheriff of old, as the King's judge, had the imme-  
diate controul of the baron's court ; and the decree of the latter  
could not be noticed by the superior court till it was approved by  
the sheriff. Lord Kilkerran, in whose collection this decision is re-  
ported, observes, ' That the President gave it as his opinion, that the  
' baron himself might execute his own decree, and give the warrant  
' for open doors.' A baron has now no jurisdiction but for reco-  
very of his own rents. Even under the dominion of the feudal  
principles, an English baron was never possessed of such a degree of  
power ; nor have we any precedent in this country to show that a  
Scottish

\* Dick against Lawds, 7th December 1630

Scottish one had any pretensions to it. The opinion, therefore, given by the Lord President in the 1748, when the powers of our baron courts were reduced to shadows, was extraordinary indeed. However, several barons, and particularly the magistrates of the city of Edinburgh, as such, relying upon this decision, have assumed the power of giving warrants for forcing the doors of debtor's open, in order to poind their moveables.

*Arrestment.*



As soon as a writ of *Fieri facias* is delivered to the English sheriff, the whole effects belonging to the debtor are held to be invested in him, in the same manner as if they had been specially transferred; and, consequently, all sales or conveyances made to elude the effect of this judicial transfer, are void and null. In this situation, there could be no use for any thing like our present arrestment. The sheriff can sell the moveables, seize upon them in whose hands soever they are within his jurisdiction, and recover the debts due by third parties to the debtor, in the same manner as he could have done himself.

In Scotland, although our old code, and the statutes anterior to James I. are, like those of England, full of rules for attachment of the effects of debtors to answer in actions, there is not one word to be met with, of arrestments considered as an execution. We entertained no idea of a diligence so imperfect, after having a decree in our possession. The *Fieri* and *levari facias* in England, and the brieve of distress in Scotland, made no distinction between the goods in the debtor's real possession, and the rents due to him for his land. The sheriff sold the one, and levied the other, in the right of the debtor, which was equal, in effect, both to our present arrestment and our forthcoming. This effect does not appear to have been determined with such precision as in England; because, from the reign of James III. downwards, our law and practice was in a state of declination from the ancient system common to the whole island; and we were imbibing the customs of France, and the principles of the Roman jurisprudence, in opposition to the common law of the land. The property seems only to have been transferred, not from the date or delivery of the writ, but from the date of the actual seizure by the sheriff. When we say this, we must be understood to speak of third parties, purchasers, and not of other creditors of the same debtors; for we shall soon see, that, *quoad* them, a different rule subsisted.

Akhough

Although the term *arrestment* occurs frequently in the acts of the five Jameses, yet it always respects the arrestment of criminals by the King's officers, and has no kind of relation to the prohibitory diligence which at present goes under that name. Nay, though a variety of acts are to be found, discharging the whole artillery of the law upon debtors, under the censures of the church, there is no mention of arrestment of their effects; but the letters, by these statutes, are always for poinding, apprising, and distrenzieing the moveables of the parties. Poinding answered every purpose, and there was no necessity for doing the half of the business by arrestment. Thus we find it determined by a decision preserved by Balfour in the year 1569, that 'a decret being obtained against any man, the farms being in his tenant's hands, and auchtand to him, may be poinded and distrenzied for execution of the said decret, albeit he against whom the decret is given, has goods and gear strinzieable therefore \*.' By several other decisions of the same period, it is clear, that the then practice was to poind the effects of debtors in the hands of third parties, and not to arrest them †.

About the time of the institution of the College of Justice, the old method of attaching moveables ceased, because the precept or summons did not, like the brieve of distress, contain any warrant for that purpose. To supply this, letters of arrestment were issued, which did not bear an order to seize upon the debtor's goods, but only to arrest them, *i. e.* to prohibit the debtor, in the King's name, to touch them, until he should find caution to pay the debt in the event of a decree being given against him. When the property of goods was claimed by different persons, letters were obtained by one of them to arrest the goods in dispute, to remain untouched by any of the parties, until the point of right should be determined by the proper judge. This species of arrestment still continues, under the title of *sequestration*, and belongs to a different branch of our practice.

3 L 2

As

\* Balfour, p. 398.

† Ibid. p. 404. c. 24.

As the principal moveables of these days consisted in corn, either growing or cut, cattle, and rural implements, the arrestment for security of debts was always used upon them ; and this, it seems, was sometimes done without giving notice to the owner, which we find first corrected by a decision in Balfour \*. All arrestments of this kind were looseable upon caution ; and therefore, if the party arrester refused to accept of security, the judge, upon application, obliged him to receive it ; and the nature of the bail was, that the same goods, or their value, should be forthcoming to any party having interest. The crime of breach of arrestment was not laid upon the injury done in disappointing the creditor of his security ; but, like civil rebellion, it turned upon the disobedience of the command of the King's letters, or those of the superior by whom the order was granted. It therefore imported a heavy punishment. The particulars of it appear from the following decision collected by Balfour †.

' Arrestment by the King's letters being lawfully made upon any debatable cornis, gudes, or gear, gif ony person or persons breaks the same, and beis convict thereof, all their moveable gudes may be confiscat, applyit, and inbrocht to the King's use ; and alswa, they may be chargit to enter their persons in ward, at the King's will, there to remain for zeir and day ; and farder, at the King's will, upon their awin expences, for their contemptioun done to his Hieneis in breaking of the said arrestment.'

These were the first arrestments ; and, it is evident, they were all of the nature of what we now understand by sequestrations, prohibiting the parties to touch their own goods in their own possession. In fact, this was the first deviation from our ancient law. Our sheriffs, of old, poinded, i. e. seized the real possession of the goods of debtors until caution was found. But, when the executive business of the nation devolved upon messengers, sheriffs in that part, a power of this kind was inconsistent with their character, or with the safety  
of

\* P. 389.

† P. 539. c. 10.

of the people ; and therefore they were trusted with no more than the execution of a prohibitory order, arresting the goods upon the spot, and imposing a penalty upon the breakers of it. This idea of arrestment in a man's own hands, remained long in the law, after its principles and origin seem to have been entirely forgot. A creditor of a lady arrested a quantity of wool in her own hands, and pursued a third party, who had purchased from the lady. The Lords found, that this arrestment, albeit it was only made in the lady's own hands, and nowise known to the buyer, nor intimate to him, yet did so affect the wool really, at the instance and to the behoof of the arrester, that, after the laying on of the same, none could profitably bargain, or do any deed which might frustrate the effect of the arrestment, and prejudice him of execution thereupon ; and therefore sustained the action \*.' This was a decision replete with injustice. If this arrestment was used in the lady's hands upon a dependence, she alone could be attacked for breach of arrestment ; but, if it was used upon a decree by way of execution, the arrestment was an ineffectual diligence, as the goods ought to have been poinded †.

We now go back to bring up the other, and still subsisting kind, intended to reach debts due to the debtor, which, according to our practice, cannot be come at by poinding. The English sheriffs were vested, by delivery of the writ, not only with the moveables in possession of the debtor, but with all the debts due to him ; so that they could sue for, or order the recovery of any debt, in the same manner as could be done by the party himself. But a trust of this kind was incompatible with the character of our sheriffs in that part ; and therefore debts due to the debtor were arrested and stopped in the hands of third parties, in the same manner as they were in the hands of the debtor himself, which was all that the diligence authorised the officer to do.

About

\* 10th January 1624, Innerweek against Wilkie.

† Vide Lord Stair, p. 388.

About the time of the institution of the College of Justice, neither an arrestment in the debtor's own hands, nor in the hands of the debtors to him, gave (as they now do) the arrester any preference. All the effect of such writs, was to detain the goods in the hands of the parties for the behoof of all having interest. It was the decree of the Court which created a preference, or formed any lien upon the property. 'Divers and sundry decreets (says Balfour) being obtained, by divers and sundry persons, aganis ony man, gif the obtainaires thereof cause arrest his maillia, fermis, and duties, in his tenants hands, for payment to be made to them thereof, the tenants aucht and sould pay first to him wha obtained the first decrete; and he being fully and compleatly paid, they sould make payment to him wha obtained the second decrete; and he being compleatly paid, they sould consequently pay the rest of the creditors wha obtained decreets, and causet arrestments to be made after the order and priority of time in obtaining of their decreets \*.' From this decision, and several others to be found in the same collection, it is proved, that the arrestment at that period had no effect in preferring the creditor-arrester, even where it was executed after the decree had been obtained. Such being our law, it is plain, that we had no more use in our practice for an arrestment in execution, than the English had. The delivery of their writs carried the debts of the party to the sheriff, and our decrees carried it to the creditor himself.

The same decisions further inform us, that the method of pointing the tenants for the rents due to their masters, had given place to the simple arrestment in their hands; and upon this footing it has ever since continued. It is now an established rule, that the rents due by tenants are affectable only by arrestment, which is a very great relief to that useful class of men. We wish here to be understood as speaking of personal debts of land proprietors. The powers of superiors and landlords, in recovery of their rents and duties, come

\* Balfour, p. 391.

come under a different title, and are set apart for particular examination.

The next question is, In what manner our law came to alter from the rule of the decision quoted by Balfour ; and, in place of regarding the date of the judgment and decree obtained by creditors, should prefer them according to the date of the arrestment used by the messenger in virtue of his letters ? There is a large blank in the decisions of our Court ; for, from the collection made by Balfour in the reign of Queen Mary, we have little or nothing to be depended on, till Sir Alexander Gibson of Durie began his work in the 1621. In this dark period, however, a number of considerable changes in our law took place, all occasioned by a fond and fashionable imitation of the customs of France. In Durie's time, we find this point completely established ; and the very first reflection upon the laws of France must convince every person, that the whole system of our modern arrestments has been, in the period we have mentioned, implicitly borrowed from that quarter.

‘ According to the customs of France, (says the commentator of that of Normandy), the first arrester of moveables, though posterior in date, is preferred upon the axiom of the Roman law, *vigilantibus jura subveniunt*.’—‘ Seizure and arrest (say the modern French lawyers) is that which the creditor makes against his debtor or in the hands of a third party, who owes money to the same debtor ; and the effect is, that this third party, in whose hands arrestments are made, cannot quit with any thing in his hands to the prejudice of the arrester. This seizing and arrestment may be made anterior to a decree, in virtue of an ordinance of a judge.’ The writ usually contains a summons against a third party, to ascertain what he owes, and to be decreed to empty his hands into those of the arrester \*. These rules of the laws of France are so precisely consonant to those of this country, that we cannot entertain

\* Grand Ency. voyez Saisie et Arrest.

tain a doubt from whence we borrowed the whole rules of our modern arrestment. Accordingly, at the time when Sir Alexander Gibson began to collect his decisions, we find these rules established in practice. We find, that the execution of an arrestment, even upon a posterior decree, is preferred to a second execution upon the first decree, in direct opposition to our ancient law.

We now proceed to the positive laws made in behalf of this branch of practice. By c. 118. of the 7th Parliament of James VI. it is statuted, ' That the persons convicted of breach of arrestment ' shall be punished by escheat of moveables, and that the creditor- ' arrester shall be preferable to the escheat for his debt, damages, and ' expences.' This statute did no more than revive the law which subsisted in the same case fifty years before, as we have learned from Balfour. Part of it still remains against people who disobey the order of our courts by breach of sequestration. That of arrestment is generally attended with no other penalty than payment of the debt.

A very curious remainder of the ancient power of our sheriffs remained for a long period with the messengers. All the ancient attachments were looseable by the debtor's finding pledges or cautioners, the sufficiency of which was judged of by the sheriff. This power, it seems, remained with the messengers who came in their place; and, by a most extraordinary and slovenly practice, the whole body of messengers were supposed to be possessed of it. Owing to this circumstance, if an arrestment was laid on by one messenger in virtue of letters under the Signet, it behoved to be loosed by another messenger, by letters of loosing arrestment, to whom the debtor was obliged to deliver a bond of caution. Even this trust, small as it was, was abused by these officers; and they were accordingly deprived of it by the act, c. 17. of the 22d Parliament of James VI. By this statute, the ancient powers of our sheriffs remaining with their representatives the messengers, were entirely and most properly cut off; and, from that date, commenced the regular method

method of finding caution in the books of Session, which has ever since subsisted.

Letters of arrestment, when given out by themselves, were, in fact, nothing more than inhibitions of moveables intended to effect them in the hands of the proprietor, as well as in the custody of third parties. After the French rule of the *premier arrestant* took place, we find the letters issued by themselves in the same form as the inhibition; and such continues to be the style at this moment, viz. that the debtor, 'In defraud, hurt, and prejudice of the complainer, intends to sell, dispone, dilapidate, and put away, all and sundry goods, gear, corns, cattle, horse, milt, sheep, debts, sums of money, insight plenishing, maills, farms, and duties of lands, and all other moveable goods and gear belonging to him.' The will of the letters is, that 'ye fence and arrest all and sundrie the goods, gear, corns, &c. pertaining and belonging to the said G. D. wherever or in whose hands the same may or can be apprehended, to remain in their hands, under sure fence and arrestment, ay and while caution and soveryty be found acted in our books of Council and Session, that the same shall be made furthcoming as accords.' The first reflection upon this style, demonstrates that these letters were intended to have effect in the hands of the debtor himself; and, to prevent him from touching his moveables, with as much certainty as in inhibition ties up the hands of a land proprietor. If this had not been the case, how is an arrestment to affect a man's corns, cattle, horse, and even the furniture of his house, none of which articles could be in the possession of any other person but himself? Such was the species of arrestment which we borrowed from the French, and which came in place of our own ancient form, of forcing the defender to find caution for the event of an action. At first, these letters were always joined with inhibition; and, accordingly, in the act of Council dated the 3d of June 1597, ascertaining the prices of signet letters, we find the inhibition and arrestment joined together. Afterwards, when horning and poinding



were allowed to be issued in one warrant, the addition of the two words, *fence* and *arrest*, gave that compound diligence the additional power of an arrestment.

Letters of arrestment *per se* are always taken upon depending actions, or upon grounds of debt upon which no other diligence can proceed; and the arrestments, in that case, are to subsist only till caution be found. Letters of horning contain no such condition, because the arrestments upon that warrant are not for security, but for execution. It is intended to reach every thing in the hands of third parties which cannot be got at by poinding; and therefore such an arrestment cannot be loosed by caution, or any other method than that of payment of the debt.

We do not intend to enter into the practical part of this diligence, as it belongs more properly to the processes of multiple-poinding and forthcoming.

*Inhibition.*

---

---

### *Inhibition.*

**T**HE precise period when letters of inhibition came into legal practice has not been hitherto ascertained. It is probable, however, that, anterior to the 1469, when the ancient form of apprising was new modelled, the inhibition must have been little known; because the first step of the old procedure was a seizure of the land itself; consequently there could be little occasion for a writ of that kind, except to prevent the debtor from disposing of his moveables. The inhibition, from the period of its introduction, had, and continues to have the strongest, the most sudden and determinate effect of any writ known in our law; and therefore its history and its principles are equally deserving of our curiosity, and necessary to our instruction.

The provinces of France, termed *Les pays de droit ecrite*, notwithstanding the conquests of the barbarians, retained a great part of the jurisprudence of the Romans, their first masters; and, upon the revival of the study of the civil law, they added to their former stock. The customary provinces also received the civil code, as law in every case not determined by the feudal usage; and thus, among the rest, the whole doctrine of the Roman hypothecs became prevalent in France. The notaries and churchmen, the only clerks in these days, very soon took the advantage of these newly revived titles, in security of their own acquisitions, and also introduced them into the deeds and transactions of private people. Not satisfied with the tacit hypothec

competent to masters upon the fruits of the land, and with the power of distress which the common law afforded to proprietors for the recovery of their rents, these ecclesiastical masters borrowed from the civil law the conventional hypothec, and extended it over the whole property, heritable and moveable, present and to come, belonging to their tenants. This they joined with the usage of distress, and stipulated, that they should be at liberty to seize upon the property of the tenant wherever it could be found ; nay more, to sell and dispose of it, without being accountable in any other shape but by a simple oath ; and, in order to make sure by every method human and divine, the tenants are made to consent to their being excommunicated by the granter's of the lease upon the failure of every term's rent.

The same laws were adopted, and the same style was practised in Scotland, of which there is evidence sufficient to be had in our charter chests, from the deeds executed in the middle of the fourteenth century, and downwards ; and, indeed, the noble collection of ancient records published by Mr Rymer, enables us to establish this fact in the history of our law by undoubted authority. Thus, by the bond granted by James I. to the King of England for his ransom, dated 28th March 1424, he was obliged not only to hypothecate his whole property, present and future, but also to submit himself to the jurisdiction of the Pope, or any other ecclesiastical court ; and the bonds granted by the magistrates of the several royal boroughs for the same purpose, are all in a similar form. As further evidence that the same mode of obligation by hypothec continued in Scotland during the reign of the five Jameses, the following direct authority from Balfour will be attended to : ‘ It is leifom to  
 ‘ any man to bind and oblige his goods and gear, present or to  
 ‘ come, or the fruits of the ground pertaining to him, and yet beand  
 ‘ thereupon : *Item*, guids or gear corporal, as horse, or incorporal,  
 ‘ as debts, weddis, or liferentis \*.’

When.

\* Balfour, p 150..

When a temporal judge admitted any cause which the ecclesiastics deemed to be within clerical jurisdiction, they issued a writ, *inhibiting* and *discharging* him to proceed. Hence we find the following instruction to the commissaries of Edinburgh so late as the 1610.

‘ Gif ony temporal judge within this realm will proceed in causes  
 ‘ belonging to your jurisdiction, ye shall direct precepts to *inhibit*  
 ‘ them from all proceeding thereuntill \*’—‘ Inhibitions (we are told  
 ‘ by Sir George M’Kenzie) have their origin from the canon law,  
 ‘ whereby, if the secular judge did interpose in any thing that was  
 ‘ ecclesiastic, the ecclesiastic judge did inhibit him to proceed. With  
 ‘ us they were first used in the matter of teinds in the same sense,  
 ‘ but now the word is extended to letters, whereby the judge inhi-  
 ‘ bits debtors to sell in prejudice of creditors †.’ This is one of the  
 very few hints which our writers on the law have left us regarding  
 the origin of our writs, and it is a just, though superficial one. The  
 bishop’s courts anciently issued these inhibitions of teinds in Scot-  
 land; and, consequently, it is an article of the instructions given to  
 the commissaries, ‘ Ye shall give forth inhibitions upon teinds great  
 ‘ and small, as ye are desired upon the sight of the parties title al-  
 ‘ lenarly ‡.’ The purpose of these letters or precepts was to dis-  
 charge the proprietors from carrying off the corn, until the church-  
 men who had right to the teinds, drew them out, or, as they termed,  
*tythed* the crop. They proceeded, therefore, upon a right to the  
 corn, which affected the whole of it as it stood upon the ground,  
*i. e.* every tenth slock, good or bad. Now, when any man granted  
 either a general or a special hypothec upon his whole property, he-  
 ritable or moveable, in favour of a creditor, that creditor had, ac-  
 cording to the idea of the Roman law, a right extending over the  
 estate of this debtor preferable to all other creditors. These hypo-  
 thecs were corroborated by the oath of the party, and by a proro-  
 gation or subjection of the matter to the ecclesiastical jurisdiction;  
 and,

\* Balfour, p. 665.

† Obs. on Stat. p. 257.

‡ Balfour, p. 665.

and, therefore, when the creditor had reason to suspect that the debtor was destroying the subject of his hypothec, he applied to the ecclesiastical court to interpose by their writ of inhibition, which appears to be the origin of that diligence in our law. If, when the debt became payable, and the demand was made, the debtor did not comply, the process of cursing or excommunication went out against him by the church, proceeding upon his consent in the deed, and letters of poinding and apprising were issued against his property, moveable and immoveable. These terrible effects were often defeated by appellations from the sentence of cursing; and several statutes in the reign of James III. and IV. are directed to shorten the delays occasioned by these appellations, particularly the act 36. of the 5th Parliament of James V. anno 1537, declares, that they are to last no longer than a year. Before that time they lasted for several years; and, upon these occasions, it is reasonable to suppose that the letters of inhibition were introduced in order to preserve the property *in medio*, and to discharge the lieges from having any dealings or intercourse with debtors in that situation. Every common creditor who had pactioned for it, was entitled to letters of cursing, which were a kind of interpellation against the lieges from having any communication with the person accursed, so far as concerned spirituals; but, when creditors had the whole of their debtor's property hypothecated for their debt, they were entitled to the inhibition, to preserve their conventional right, and to notify it to the lieges. These letters, as well as interdictions, and many others, were current in Scotland long before they came to be noticed by any public act or statute, and appear to have been introduced by custom alone.

Our next inquiry must be for the causes which produced this singular writ in Scotland, while it remained unknown to our neighbours. We did not derive the idea of the inhibition from the Roman law, but we derived the form of the hypothec itself; and, from the whole deeds yet remaining from the fourteenth century downwards, it is certain that there is no contract or obligation, the  
importance

importance of which made it be executed in authentic form ; but in it we find a conventional hypothec stipulated. This method came so much into common use, that the notaries and churchmen expressed only the first words of the clause, *i. e.* they wrote *binding and obliging*, &c. by which it was understood that the granter bound and obliged his whole effects, present and to come, for the implement of that deed. As they were accustomed to inhibitions and prohibitions of every kind, the extending of them to the support of contracts and deeds of hypothecation was obvious and natural. The inhibition of teinds was no other than a kind of monitor published in the parish churches, to prevent the intromission of proprietors with the vicar, until it was tythed by the churchmen. The easy and natural analogy of this form produced that of our present inhibition. This is proved by the perfect coincidence not only of the title, but of the style of these writs. The granter of the hypothec had, in most cases, made an oath not to disappoint it ; and therefore the authority of the church was called upon to terrify him into compliance. This method was found to have a double effect ; it put it at once out of the debtor's power to counteract his obligations, by warning the people not to deal with him ; and it did justice to the people, by notifying the situation of the individual. When prohibitory forms are introduced in civil matters, it is a certain consequence, that, where these forms are not used, people do not think themselves prohibited. Thus, unless an inhibition of teinds was executed, the intromitter was not held to be guilty of a *spuilzie* ; and, if an inhibition against a debtor was not used, every person thought himself at liberty to contract with a debtor, without inquiry whether his effects stood hypothecated or not ; and, consequently, the creditor had no right to recover from third parties purchasers. No such form happened to take place among the Romans or the French, and therefore the creditor hypothecator had, and still has right to actions against third parties. This, in Scotland, must unavoidably have made the right of such creditors depend entirely upon the writ  
of

of inhibition itself, and consequently established it as an essential branch in the practice in our law. How it became the right of creditors in general, we shall afterwards endeavour to explain. Meantime, let us see how this writ lost its effect upon moveables; or, in other words, how the style of the inhibition came to alter into its present form. A prohibition so extraordinary must have been absolutely incompatible with any degree of commerce in a country; and, accordingly, we find, that the customs of Paris ran counter to it; and the example of that great city was soon followed by all the other provinces. By article 170. of the  *Coutumes de Paris* , it is declared, that moveables are not subject to hypothecation without possession. The same change took place even in the provinces of the written or Roman laws, with this exception, that, so long as the moveables remain in the possession of the debtor, the creditor possessed of the conventional hypothec is preferred.

Our law, as it was originally the same, changed with that of France. Craig informs us, that, though letters of inhibition extended to moveables, the utility of the public prevailed in that particular against the interest of creditors. As it is clear, that conventional hypothecs had once been adopted into our law, it is equally certain that they went entirely out of practice, even with respect to landed property. In Rome, the conventional hypothecs were attended with great inconvenience to third parties purchasing  *bona fide* ; and therefore they adopted the Grecian method of putting marks or notices upon the subject hypothecated, in order to make their situation known to strangers. The French adopted these marks, to point out property that was actually in the hands of justice; but, in the matter of hypothecs, they never were used. In order, however, to supply the want, and to create notoriety of their hypothecs, they invented a kind of fictitious delivery of the heritage, from the analogy of the feudal feifine \*.

In

\* Encyclop. Hypoth.

In Scotland, on the contrary, the Roman mode of hypothec, it seems, did not prove sufficiently effectual. In the conveyance of the property itself, we adhered strictly to the feudal form of seifine, and to the ideas of superior and vassal. When wadsets and rights of annualrent became frequent, they were all constituted in the same manner, and, no doubt, excluded the creditors by conventional hypothecs, which must, upon that account, have vanished out of our law, leaving no trace behind them except the writ of inhibition, which, still retains strong features of its origin. This deduction is supported by the nature of the thing; for, so soon as the idea of real rights came to be annexed to the charter and seifine, the hypothecs, of consequence, must have been undermined and excluded from practice. At the same time the inhibitions continued, and came to be granted upon grounds of debt of every kind, providing they were clear and liquid; for it is certain, that to such debts alone they continued for a long time to be restricted. Even Sir George M'Kenzie tells us, that they proceeded either on a decree or registered bond; 'which (says Mr Erskine) carries a strong insinuation 'as if inhibitions could not be grounded upon any unregistered 'deed \*.' The introduction of the inhibition, as already mentioned, rendered the hypothec ineffectual of itself: It behoved to be supported by the prohibition; and therefore people naturally looked to that diligence for the whole effect, forgetting entirely upon what it had been originally founded. It is in this manner that we presume inhibition continued in our law, and that its effects upon heritable property were preserved.

The French, on the contrary, have preserved the ancient hypothec upon their lands; and therefore the inhibition is, at this day, equally unknown to them as it was to the Romans. They have different methods of making these rights known to their people. The postponed creditors are obliged to pay the debts privileged by hypo-

VOL. I.

3 N

thecs,

\* P. 370.



thees, and to take conveyances to them, as we do in the case of prior inhibitions. The English have a remainder of the same nature, which they have doubtless derived from the laws of Normandy. ‘ In the new abridgement of the English law, (says Lord Kaimes), we find the following passage. “ As to lands, they are bound from the time of the judgment ; so that execution may be of this, though the party aliens *bona fide*, before execution sued out. So of statute merchant, staple, and recognisances, which also bind the lands from the time of entering into them.” ‘ From this passage it cannot justly be inferred, that a judgment in a process, or any of the covenants above mentioned, are real rights, or make a real *alien*, as termed in England. They have only the effect of an inhibition to bar voluntary alienations. Hence the reason why letters of inhibition are unknown in England \*.’

When the conventional hypothecs went out of use with us, and infeftments were found to answer all their purposes, in a manner more secure for the party, and safer for the public, the ideas of our lawyers were wholly bent to the effects of that form ; so that it left us no private contracts, judgments, decrees, or other writs which had effect upon land in any other shape ; and, as the Latin language afforded no term for our wadsets, annualrent rights, or heritable bonds, which are no other than special hypothecs by infeftment, Sir Thomas Craig, Dirleton, and our old conveyancers, express all these by the general term *hypothecae*. Thus, without any special act of Parliament or express law, this singular writ came to be established in the practice of Scotland ; and, although the inhibition was originally an ecclesiastical execution, it soon came into the hands of our civil courts. After the institution of the College of Justice, that tribunal soon eclipsed all others in the nation, whether ecclesiastical or civil. Its Judges continued to be composed chiefly of churchmen ; and therefore it was natural for the lieges to apply

to

\* Elucid. p. 120.

to the Lords of Session for letters of inhibition, by whom they were issued in the name of the King.

When the origin of the inhibition came to be totally forgot in the manner we have stated, creditors continued to apply for it upon all occasions ; but, being at a loss for grounds or principles to go upon, they stumbled upon the pretence that their debtors intended to defraud them. From several old decisions, however, it appears, that the Lords of Session viewed this matter in a proper light, and refused to grant inhibitions without a sufficient ground alledged and proved by the creditor, of actual fraud, bankruptcy, or bad design, upon the part of the debtor. ‘ Letteris of inhibition (says Balfour) ‘ may not be given againis ony Erle, Lord, or Baron, be the Lords, ‘ without an just and sufficient cause, because the samin is hurtful to ‘ men’s fame and honour ; and moreover, no person sould be stoppit ‘ in the administration of his goods and gear without ane lauchful ‘ and sufficient cause \*.’ Nay, it appears, that the Judges removed these inhibitions with very little ceremony, upon the application of the party injured, when they judged them to be too lightly granted. This, in some degree, being irregular, was corrected by the following decision : ‘ Interdiction beand lauchfully made at the instance ‘ of divers and foundrie creditours upon ane persoun, the samin ‘ may not be lousit or rescindit be ane judge without their special ‘ consent, at least quhile they be callit to that effect †.’ The principle of this decision should have influenced every subsequent one upon the subject of inhibitions, and ought to have remained in full force. Where a creditor stands possessed of liquid grounds of debt exigible *de præsenti*, the inhibition does not appear to be an unreasonable or exceptionable step, because such a creditor may instantly proceed to affect the lands by the real diligence of adjudication ; and therefore a prohibition to alienate or contract debt upon the land, is the mildest step that he can take ; but the great

3 N 2

abuse

\* 11th July 1543, John Maxwell against Laird of Telling.—Balfour, p. 476.

† 15th February 1537.

abuse of this diligence arose from this, that, by frequency, it passed unnoticed, and came, at last, to be granted to all creditors, real and pretended, for illiquid debts, depending actions, and, in short, for every claim that one man could muster up against another. In this view, it is the most cruel and impolitic diligence that was ever introduced into the law of any country. Because one man pretends or imagines that another is indebted to him, and the experience of every day shows us upon what slight grounds these claims are reared up ; is it reasonable that another of landed property should, by a judicial writ taken out in the common routin of court, receive a blow upon his credit, be recorded not only as an actual, but a kind of insolvent debtor, and, in effect, have the amount of that pretended claim made *pro tempore* a debt upon his lands ? For, although an inhibition upon a depending action is nothing more than a simple and conditional interdict ; yet so it is, that, until the effect is discharged, the claim upon which it proceeds is considered as an incumbrance upon the estate. So long, indeed, as the old brieve of distress remained in practice, the citation for payment, the poinding of the moveables, and the apprising of the land, were no other than as many acts of the same process following one another in a determined order ; and, therefore, in case of danger, inhibition might perhaps have been issued in the course of such diligence, more especially as the ancient method of all law-suits was to begin by taking security or a pledge for the consequences. An inhibition upon a depending action, to people impressed with such ideas of procedure, might appear a just and expedient point of practice. As the letters of inhibition were introduced into Scotland by custom, without any express law ; so there is no public regulation to be found for ages, for directing the mode of their execution or publication. The forms in this business were borrowed from the French, with whom, as formerly noticed, letters of inhibition were unknown ; but interdictions of persons incapable to manage their own

own affairs, both judicial and voluntary, were in universal practice, and the method of their publication distinctly prescribed. From the French we adopted the forms in the execution or publication of the interdiction, and we applied them to the inhibition. Accordingly, we find the method to have been established, and quite familiar, in the 1554. ' The Lords letters of publication passed upon an interdiction against any man, and executed at the mercat crofs of Edinburgh allenarie, the famin execution and indorfation is null, and of nane avail; gif he wha was interdicted dwelt at the same time within an uther jurisdiction and sherriffdom, because all publications and interdictions aught and should be made at the mercat crofs of the head burgh or town of the sherriffdom where the persons interdicted dwells in the mean time \*.' This execution at the market crofs of the head burgh of the jurisdiction where the party resided, was, in the early part of our law, as Lord Kaimes observes, found to produce notoriety sufficient; and therefore the interdiction and inhibition needed no other mode of publication. Before inhibition, then, came to be noticed in any public act of the legislature, it appears, that not only the style, but also the mode of execution and publication of this writ were completely established. In this situation the diligence stood in the 1581, when the act of Parliament was made relative to the register of inhibitions †. By this time several of our registers had been established for notifying diligences to the lieges; and, from the preamble to the act, it is proved, that, as Lord Stair observes, 'inhibitions had been long in use before the statutes ordaining them to be registered; and therefore the lieges could not be put *in mala fide*, to buy from or bargain with the person inhibited, unless the inhibition were published at the mercat crofs of the jurisdiction where he lived, and at the mercat crofs of the several jurisdictions where his lands lay; but these publications easily passing observation and remembrance, great inconvenience

\* Balfour, p. 86.

† 7th Parl. James VI. c. 119.

\* convenience arose to creditors and purchasers \*. In this statute no directions are given about the execution of the diligence ; reference is simply made to the practice which the act presumes to be known and familiar. Two material points are, however, established by it ; 1st, That the inhibition must be registered in the books of the sheriffdom where the party makes his residence, and also in the shire where his lands lie ; and, 2d, That this must be done within forty days from the date of the last execution. Sir George Mackenzie tells us, that it was first doubted whether the day whereupon the letters are executed or registered is to be numbered among the forty days ; but it was afterwards found sufficient that either of these days be free. The omission of the registration voids the diligence *in totum* ; but, in whatever county it was registered, the lands lying there were affected by it ; and, notwithstanding the vague, uncertain terms of the statute, it was held to be a rule, that the diligence was null, or of no effect, as to lands lying in any other county where it was not registered.

As no jurisdiction was in this act mentioned but that of sheriffs, the stewarts of stewartries, and bailies of regalities, complained, and with reason, because not only inhibitions but hornings stood in the same situation. This produced an act of Parliament in favour of the latter jurisdictions in the 1597†. This was the first act in which the publication of the inhibition at the market cross is expressly mentioned or appointed ; but the solemnity is thereby proved to have been long, and so completely established by practice as not to require a statute. This act is not to introduce, but to extend the usage to the jurisdiction omitted by the preceding statute.

Irrregularities, it seems, had been committed in the registration of the ordinary diligence in inferior courts ; and it appears, that certain sheriffs and their clerks, owing to partialities, or connection with the debtors, refused to register these letters. To remedy these disorders, another act immediately followed the former one‡, by which the  
several

\* P. 762.

† 15th Parl. James VI. c. 268.

‡ c. 269.

several letters are appointed to be registered judicially, or before a notary and four witnesses. If the party appeared when the Judge was sitting, and produced his letters judicially for registration, he was entitled to an act of the Court upon the fact, and to an extract for the probation of it; but perhaps the Court might not sit within the forty days prescribed by the statute, and therefore registration is appointed to be made before a notary and four witnesses. But, if the inferior judge refused to record the letters, the party is to take instruments, and present them to the next inferior judge, or to the Clerk Register at Edinburgh, or his deputies, which is the origin of the General Register of Inhibitions at Edinburgh.

The importance of the Register of Inhibitions appeared in proportion to the increase of these diligences; and, notwithstanding the solemnity of the former act in the matter of registration, many negligences appeared upon the part of the sheriff-clerks, which proved fatal to the parties concerned. To correct these wrongs, a statute was made in the 15th Parliament of James VI. anno 1597\*, by which the sheriff-clerks and their registers were put under the same controul as the protocols of the notaries public; which, it seems, had so good an effect as to render the judicial forms of registration unnecessary, at least it was expected to do so, as appeared from what followed. As these solemnities attending the registration of the inhibition were found by experience to be troublesome and expensive to the lieges, the practice was totally abolished, about three years afterwards, by an act of the 16th Parliament of James VI. anno 1600. From this time downwards, the registration became a private act between the person who produces the letters and the clerk of court. The publication is entirely trusted to the register itself, and to the necessity which individuals know they are under of searching them for their own safety. Another act passed in the same session of Parliament, which established that proper and necessary regulation still observed, of referring to the particular page in the register, in the certificate of the registration written upon the back of the

\* c. 275.

the letters. But the omission of it is no nullity. The clerks alone incur a penalty, which is certainly proper, because the regulation is only a matter of expediency, not essential to the diligence. No other law was enacted in behalf of this matter until the general regulation of judicatures in the reign of Charles II. anno 1672, when the keepers of our several registers were appointed to make minute-books of the writs recorded, for the benefit of the lieges. Thus matters continued till the year 1680, when the Lords of Session, by an act of Sederunt, of date 10th of February that year, were pleased to point out a method for extending the effect of this diligence further than practice had been able to carry it. The granters of wadsets and of annualrent rights, where estates were their own property, burdened only with these debts, did not think themselves obliged to pay attention to inhibitions against the wadsetters, or heritable creditors; they observed the terms of the reversion, and paid the money *bona fide*. They considered themselves not as taking alienations of the lands of other people, but only as removing the burdens from their own lands; in which business they were not obliged to take notice of inhibitions against their creditors; and, by this means, a considerable part of heritable property escaped the power of this diligence. The Lords, therefore, interposed by an act of Sederunt\*, ordaining the inhibitor to intimate this diligence to the person in the right of the reversion, and declaring, that, in such case, any after renunciations or redemptions will not be sustained, unless the same proceed by way of action, to which the inhibitor must be cited. This act is clearly within the power of the Court. It is a declaration of the rules which the Lords are to follow in time coming, and appears to be exceedingly well devised for the purpose. It throws the trouble and expence of searching into the records upon the user of the inhibition; and it gives him the effect of his diligence only upon condition of complying with the directions of this act. Hence we should remember, that it is not enough to raise, execute, and register an inhibition. All that is thereby

\* 19th February 1680.

thereby done is to prevent the direct alienation of lands or heritable debts by the debtor ; but if we mean to prevent him from receiving payment from the proper debtors, we must be careful to make the search and intimations prescribed by this act.

Inhibitions, it seems, were formerly defeated by the feudal forfeiture of recognition, arising from deeds done by the person inhibited, after the execution of the diligence. These deeds, no doubt, were often purposely done, and the forfeiture brought about by collusion between the vassal inhibited, and the superior. This became so common as to require an act of Parliament to correct it, by ordering that lands falling under recognition, should be burdened with prior inhibitions\*.

It appears that the appointment of the act anno 1672, had not been duly obeyed, and that our keepers had relapsed into their old confusion and neglect, in so much that it roused the attention of Parliament, who renewed the old regulations with additions†. The appointment in this act of the presentee signing the minute-book, is nothing but a revival of a part of the old method. It was the addition of a solemnity, and presence of another person as a check upon the Clerk of Register, ‘ whereby (as Lord Stair says) there could be ‘ no debate concerning the times of presenting, nor durst the keeper adventure to neglect the registration within the days, having so ‘ good a proof against him‡.’

The copies delivered to the parties in executions of inhibitions, and other diligences, bore the date of the execution only in figures ; and did not mention the designations of the witnesses present, which no doubt occasioned many mistakes ; and put it in the power of messengers to injure private parties. This slovenly practice was corrected by the act 12th of William and Mary, 1st Parliament May 30. 1693. In the 1748 the heritable stewartries and regalities were abo-

VOL. I.

3 O

lished,

\* 1st Parliament James VII. c. 15.

† 1st Parliament William and Mary, c. 14.

‡ Page 765.



lished, and the records transmitted to the respective sheriff courts. Yet people continued to execute hornings and inhibitions at the head boroughs of the abolished jurisdictions. The Lords, therefore, by their act 29th February 1752, discharged these registrations as erroneous; and appointed diligences of every kind to be published at the market-cross of the head boroughs of the counties, and registered in the books of the respective sheriffs.

Thus we have endeavoured to give the origin and principles of this business; together with an historical account of the statute law regarding it, in the order of time. Before proceeding to the practical application of these laws, we shall consider the form of the writ, and its executions; because that form being early established, has remained unaltered ever since, and will be necessary to our understanding the practice. It may be observed, that this extraordinary writ proceeds entirely upon a train of suppositions\*; the creditor, after stating his ground of debt, alledges, that the debtors are conscious, that execution of all kinds is to issue out against them for payment.—This is one supposition. It is next said, ‘That they ‘upon that account intend, in manifest defraud and hurt of him the ‘creditor thereanent, to dispose of their effects.’—This is another supposition, and a very injurious one to the debtors; the evidence, or rather the apology, is, that he is ‘informed it is to be so.’ The complaint is, that the debtors intend only to defeat the diligence of the law, for the plain meaning of this language is, that if the debtors did not know or dread execution being taken out against them, the alienation of their property would not be a wrong. The creditor, therefore, by this means prays the interposition of the law, not in support of his private right as a creditor, but in support of its own authority. This most ingenious stretch in common creditors to make a title to inhibitions, is convincing evidence that these letters were originally founded upon a right in the person of the creditor;

\* *Vide* the Style in Dallas, p. 18.

creditor ; and that that right could be no other than the ancient hypothec, which we have explained.

It is strange information, that the creditor pretends to have got upon this occasion. ' He is told (he says) that the debtor means to ' sell, annalzie, wadset, dispone, renounce, delapidate, and put ' away, all and sundry his lands, rooms, possessions, and others.' After the word ' possessions' in the ancient style, were added ' corns, ' cattle, goods, and gear, or any part thereof,' as we find in the form given by Lord Stair\*. Before St Martin's time, the effect of the inhibition upon moveables was at an end ; and therefore, in his style, and ever since, the specification of the moveables is omitted, and the following expression substituted in its place ; ' And others ' whatsoever.' Considering that this writ has confessedly no other foundation than suppositions, the executive part of it gives them consequences, as solid, strong, and general, as could issue upon a positive right in the estate of the debtor. The first thing to be done is to inhibit the party himself from doing what the creditor alleges he intended to do ; and he is discharged even to contract more debts, or to give any kind of security therefor. The debtor may notwithstanding grant bonds and take on debts, as these only fall under the effect of the inhibition, when they are used as foundations for attacking the land ; and accordingly, the style is so qualified, for it is only such bonds and debts that are discharged, ' whereby the right to the ' lands may be evicted and apprised from the creditor inhibitor.' Notwithstanding this strict prohibition laid upon the debtor, the disobedience of it was never attended with any penalty or consequence, so far as can be learned from our law or practice ; nay, there is not the least vestige of its being taken notice of as a contempt of authority. The reasons are obvious ; when inhibitions came to be granted as matters of course, upon the mere alledgeance of the creditor, the ease of the injunction created the same ease in

\* P. 762.

the disobedience. The diligence was looked upon to be a stretch of the law, which it ought not have allowed. The execution, therefore, against the party, serves only to put him in *mala fide* from contracting with strangers. It is to them that the injury is truly done, and not to the creditor at whose instance the letters proceed.

In the next clause of the style, which, as it contains the public prohibition, is the substantial part of the writ, open proclamation is ordered to be made 'at the market cross of \_\_\_\_\_ and other places needful.' Before the act of Parliament 1581, inhibitions were only executed or published at the market cross of the jurisdiction where the debtor lived; and that act makes no difference upon the mode of execution then in use; but only appoints them to be recorded in the register of those jurisdictions in which the debtor had lands. As the essence of the business, however, lay in proper publication, messengers, in order to answer the words of style, 'and other places needful,' got into a practice of executing inhibitions, not only at the market cross where the party dwelt, but also, from the analogy of warnings they executed them at the kirk-doors, and at the market crosses of all the jurisdictions where the acts of Parliament required the registration. Lord Stair says, 'That this practice arose from the advantage of messengers, in order to the making of more work, and larger allowance; but he concludes, that there is no necessity to publish at the mercat crosses where the debtor's other lands lie; yet it is certain, that the inhibition will not be effectual against any lands, but where it is either registered in the particular register of the jurisdictions where the lands lie, or in the general register which supplies all these registers; whence it is evident, that inhibitions may be effectual where they are registered, though they be not there published \*.'

It must here be observed, in support of the act of Sederunt which rendered intimation necessary to cover heritable debts, that, though the debtor is inhibited from renouncing his reversions, his heritable  
creditors

\* P. 763.

creditors are not (with the other lieges) inhibited, by the style, from receiving discharges and renunciations ; and, to the reasons already given, it is necessary to add a general rule, that inhibitions do not strike against such deeds as the debtor is under the necessity of granting by obligations prior to the inhibitions. Now, all heritable creditors stand bound, by the terms of the reversions, to renounce upon payment ; a circumstance which farther demonstrates the necessity of a particular intimation in these cases, as directed by the act of Sederunt.

*' Certifying them that do on the contrary, that the same shall make no faith in judgment.'*—By this part of the style, a person would be led to think, that deeds done *spreta inhibitione*, are null in themselves, or, as the lawyers say, they become so *simpliciter*, upon making the exception ; but so it is, that the Court, at no period, allowed this to be done. To give an inhibition effect, a process of reduction must actually be brought upon it. The letters import no more than a personal prohibition against the party, which requires a declarator and rescissory action, in which it may be found that the prohibition of the law has been contemned, and that the certification may be applied. There is no exception to this rule but in the competition and ranking of creditors, where, to save time and expence, the Lords are accustomed to give effect to this diligence by way of exception.

*' And that ye cause registrate thir our letters, with the execution thereof, within forty days, conform to act of Parliament.'*—As the publication to the lieges is trusted to the messenger, the executor of the letters, he is also trusted with the registration of them, which is the circumstance the most effectual for putting the public upon their guard. In practice, it is always done by the creditor himself, or his doers, who have principally interest in complying with it. It is necessary to remark, that, in all cases where a person is out of the kingdom, letters of inhibition ought to have a special warrant for inhibiting the party at the market cross of Edinburgh, pier and shore  
of

of Leith, because this is a most unfavourable diligence, often hurtful to the party, and still more detrimental to other debts; therefore the messenger is limited to the express terms of the letters; and, unless they contain a warrant for execution furth of the kingdom, the execution will be null, as done without authority. We conclude what we have to say upon this form with a general observation, that, in regard to the strict interpretation of the letters of inhibition, and the unequitable consequences that often flow from them upon posterior creditors, judges are naturally inclined to defeat their effects upon slight objections. The dread of this has induced the Writers to preserve the style entire, without venturing to add a single word since the days of St Martin; and, for the same reason, the letters ought to be carefully written, the execution should be attentively performed, and the registration of the whole duly attended to. As the style of the schedule to be left for the party is always uniform, messengers have them printed with blanks, for specifying the date of the delivery, the ground of debt, and the witnesses names and designations present, which must be done at length, and not in figures, by the act 1693; this copy must be signed by the messenger, but need not be signed by the witnesses, delivered to the party personally; or, if he cannot be found, it must be delivered to his wife or servants, within his dwelling-house; but not till after inquiring for the debtor himself, and being told that he is absent, or access pointedly refused him. If the door is kept shut, the copy may be left in the lock-hole, or upon the most patent door or gate. After six audible knocks are given to obtain admittance, if the party is actually known to be resident in another county at the time, the letters ought to be executed against him both personally and at his ordinary dwelling-place; at least, it is the safest method so to do, though not absolutely necessary.

This personal execution being made, the messenger goes to the head burgh of the sherrifdom in which the debtor is inhibited; and there, at a proper time of the day, he ought to make open proclamation,

mation, read the letters aloud, and verbally inhibit the lieges, by reading the copy ; which having done, he affixes it upon the cross in the form of a placard, for the information of the public. These ceremonies were all anciently appointed for the proper *certioration*, as it was called, of the lieges, who, for a long period, had no other chance of being put upon their guard ; but the careless performance of them, and particularly a practice which we see daily done, of tearing away the copy from the cross the moment it is fixed, added to the other reasons before mentioned, obliged the legislature, for the public safety, to appoint a record of these material executions. This was done about two years after the registration of hornings, in the 1579 ; but it was done upon much better principles. The register of hornings was intended to furnish materials for the oppression of the public ; whereas the record of inhibitions had no other purpose than to guard the people against an insidious diligence, which the law of their country had unwarily admitted. We retain so much of the ancient cautions spoken of by Lord Stair, that, if an inhibition be executed at the dwelling-place of the party, and against himself personally at another place, it is also executed at the market crosses of both jurisdictions ; but the fixed and indispensable rule is, always to make sure of having the letters executed at the market cross where the party is personally served. The actual ceremony being over, the messenger returns a certificate, which is termed an *execution*, of all he said, and all he did.

The solemnities of the inhibition serve a purpose diametrically opposite to that of their first institution. The public is seldom obliged to them for any knowledge of the matter. They are preserved, therefore, as impediments upon this unfavourable diligence, that, from the errors and omissions attending them, the Judges may have it in their power to defeat the effects of it, when set up in contradiction to sound equity and justice.

When the party to be inhibited is out of the kingdom, the letters must be executed at the market cross of Edinburgh, pier and shore  
of

of Leith, if they contain a warrant for that purpose. The extending of the diligence to people in this situation, was undoubtedly a stretch made from the analogy of summonses, which is an alteration, or rather addition to the style of the ancient inhibition. Indeed, our practitioners seem to have adopted it as a general rule, that, whatever can be done against a man in person, may also be done against him at the market cross, pier and shore. In the case of inhibition, this shews, that the party is not presumed to incur any penalty or consequence from disobedience of the order; for nothing can be more absurd than a penal prohibition fictitiously laid on. When a man is personally inhibited, third parties have at least the chance of his honesty in their favour, that he will not sell them a property, when under an inhibition, without giving them to know his situation; but a man of the best character, when absent from the country, may innocently ensnare others who have confidence in him; nor can he be certain of his own situation, until he search the registers to know what has been done in his absence. On the other hand, if the edictal prohibition was not allowed, people would leave their country on purpose to have the power of alienating at pleasure. In short, this diligence has a radical inconsistency in itself, which unavoidably draws many more after it; and, though not a favourite of the courts of justice, it has always been a favourite of creditors who have struggled for it in every case, and who have procured the extension of it even to persons out of the kingdom.

When the letters are duly executed, and executions returned by the messenger, the whole must be registered within the forty days, in terms of the several acts of Parliament. The forty days run from the date of the last execution made by virtue of the letters; and, although the act 1581 prescribed the registration of this diligence only in the jurisdiction where the greatest part of the debtor's lands lay, yet it has always been the practice to explain this indistinct appointment into registration in the books of each jurisdiction where  
the

the debtor has lands, or in the general register at Edinburgh; and the law has limited the effect of the inhibition accordingly.

Having given the history of this diligence, examined its steps and formalities, we now come to inquire into the real import of these formalities, and into the effect which our Judges have actually given to the inhibition itself. Too much pains cannot be taken to acquire a familiar and perfect understanding of a writ which makes such a capital figure in our law and practice.

Craig is thought to have written about the year 1600; the registration of inhibitions was only ordered in the 1581; yet, from his account of the matter, it is evident, that, notwithstanding that act, which appointed publication only at one market cross, practice had very soon after made publication necessary, wherever registration was so, and the registration, at that period, took place in every county where the debtor had lands.

Although inhibitions had ceased to effect the commerce of moveables long before the end of the 16th century, yet, as the style remained untouched, creditors still endeavoured to give it effect. Growing corns, we have often heard, were considered as *partes soli*. A person inhibited conveyed his corns in that situation, and the inhibitor brought a reduction of the assignment. The Lords, however, assoilzied, because they found, that an inhibition only affects heritable rights, and not moveables; so that growing corns were no more considered as *partes soli* \*. A party who had inhibited upon a simple moveable bond, brought a reduction of an heritable right. The defender objected, that, unless real diligence had followed upon this personal debt, it could not be a ground for reducing a real right. This gave the inhibition an immediate and terrible effect; and it has ever since been sustained as a title for reducing all the heritable rights against which it strikes, but still it gives the inhibitor no hold of the lands. His reduction only prevents them from being touched

\* Lord Braco against Ogilvy, March 22. 1623.—Durie, p. 69



to his prejudice by other people, untill he shall be pleased to effect them by real diligence at his own instance. The warrant in the inhibition was always strictly interpreted; so that if the party did not act precisely in terms thereof, he, of consequence, had no authority to plead it in his own behalf. This point of practice is well illustrated by the next decision \*. A party took out letters of inhibition, containing a warrant for execution at the market cross, pier and shore, upon 60 days; but it contained no warrant for execution against the party himself, either personally, or at his dwelling place. Nothing, it seems, was done upon these letters till the party returned to Scotland, when they were executed personally against him, and at the market cross where the lands lay. An objection was made, that this personal execution wanted a warrant; which the Lords sustained, in regard that he ought to have craved a warrant to do the same. A case of the same kind happened soon after. An inhibition, containing only a warrant out of the kingdom, was executed at the party's dwelling house, and the same objection made. The inhibitor endeavoured to defend himself by the words of stile, 'and other places needful.' He also pled, that the debtor being abroad, was comprehended under the general inhibition of the lieges at the market cross, pier and shore; but neither of these evasions would do. To the last one the answer was obvious: The lieges were inhibited not to contract with the debtor, but the debtor was not discharged to contract with them †. The next determination finally established the point already mentioned, that an inhibition upon a personal debt strikes against posterior debts, though heritable, so soon as the second debt is made the ground of real diligence for affecting the lands of the debtor ‡.

When parties lie under prior obligations to grant deeds, the implement of these obligations cannot be said to be in defraud of any person;

\* Erskin against Erskin, 24th January 1627.—Durie, page 262.

† March 19. 1628, Lamb against Blackburn.

‡ Douglas against Johnston, July 2. 1630.

person; and, consequently, ought not to be cut down by intervening inhibitions. This rule is early laid down by Spottiswood; and cases soon happened in which the meaning of it was ascertained. A debtor disposed his lands to another person, who held his obligation long before the inhibition: The obligation bore also, that the debtor should invest the creditor in an annual rent of his money out of any of his lands; yet the Lords found, 'that the alienation could not be thereby supported \*.' The practical inference from these cases is, that prior obligations, when inhibitions are known to intervene, ought to be implemented in *terminis*; for, had the creditor, in the case of Scott against Turnbull, taken an annual rent right in place of a disposition, that right would have been sustained. The best method, therefore, is to take separate deeds; one of them in terms of the obligation; and the other puts it in the power of the creditor either to pay the debt, or to take whatever advantage may lie against the inhibitor's diligence.

Inhibitions, it seems, had all along preserved their original effect upon lands; and were held not only to debar the debtor from alienation of the property he stood actually possessed of at the date of the execution of the diligence, but also to prevent him from disposing of the heritable property he might acquire or succeed to, from that time forward. This is certainly a wonderful effect of a writ, given upon slight, and even fictitious reasons. A creditor, surely, in every case trusts his money to the estate that the debtor is possessed of at the time, and not to what he may afterwards succeed to or acquire. Neither can it be said that a debtor intends to dispose of his property in fraud of any person, which he neither possesses, nor is perhaps in expectation of; and yet so it is, that inhibitions have affected, and continue to affect, those future acquisitions, in the same manner as it does the present estate. Were there no other circumstance than this, to point out the antient source from which the in-

\* January 21. 1629, Scott against Turnbull.

hibition has arisen, we should humbly think it sufficient for the purpose. When the doctrine of hypothecs made a part of the law, and a man expressly hypothecated his whole effects, heritable and moveable, which he was then possessed of, or which he might thereafter succeed to, *any manner of way*, (for these were the words of the style), he gave a solid ground for the effect of the inhibition; but, when the creditor had no right of any kind to pretend in the property of his party, the simple existence of his own debt excepted, to allow him to lay such an extravagant injunction upon the debtor, in virtue of a single writ obtained upon a fictitious pretence, seems to be devoid of every principle either in law, equity, or reason. So it is however; our forefathers have admitted it, and we must continue to do so.

From the 1642, where Durie's collection of decisions stops, we have no journal of the proceedings of our supreme Court, until Lord Stair recommenced that necessary work in June 1661. The first decision he notices upon the subject, is the 18th of July 1662, Swinton. A woman falling heir to a person inhibited, instantly sold the lands, which had become the property of the deceased after the inhibition. It was objected, that the inhibition was not registered in the books of the county where the lands sold lay. 'The Lords found the defence relevant, that the inhibition could not extend to the lands in other shires falling to the person inhibited, *quocunque titulo*; but that the pursuer ought to have inhibited *de novo*, or published and registrate in that shire; seeing all parties count themselves secure if no inhibitions be registrate in the shire where the lands lie, without inquiring farther.' This decision points out a material circumstance in the nature of inhibitions, notwithstanding their prodigious effects. These effects are only personal, drawn from a prohibition against the individual: They expire with his life, and the heir stands free from all impediments.

A few years afterwards, this material point came more directly under the cognisance of the Court; in which we find it denied that  
it

it was ever expressly decided that inhibitions did reach lands acquired after the execution. The answer affords the best apology to be had for the extraordinary effect attributed to this diligence. 'It is said, that the prohibition respects the person inhibited directly, and the lands but indirectly, as they belong to him; so that there is no difference whether they belonged to him before or after; for *hoc ipso* that they are his, they fall under the restraint, and the alienation thereof is to the prejudice of the user of the inhibition.' The nature of the inhibition is here pointed out with a happy precision, illustrative of the true principles of this writ. So far as regards the debtor's property, it can go no further than to what he is actually possessed of at the time; *quoad futura*, the prohibition is simply personal. In the same manner, the obligation binding or hypothecating a man's future acquisitions, must have been simply personal; and there is no other principle upon which this effect of the diligence of inhibition can be founded with any degree of probability; for almost every word of the present style contradicts the idea of its extension *ad acquirenda*. The lieges are only prohibited from purchasing the lands pertaining or belonging to the debtor in defraud of the creditor. A purchaser, therefore, of lands acquired after the date of the inhibition is not in defraud of the user of it, who is in the same situation he stood in at the date of its publication. The Lords expressly found, that inhibition did reach to lands acquired after their publication \*.

The next decision goes to a point, which in our present system of business occurs every day. A depending action, or alledgeance of debt, was early found to entitle the pursuer to an inhibition. A party having executed an inhibition upon the dependence, submitted his cause. The arbiters pronounced a decree upon the submission in favour of the claimant, formerly the pursuer, who therefore insisted that his inhibition remained effectual, but the Lords had no respect.

\* Feb. 22. 1667, Ellis against Wishart.

respect to the diligence, in regard no decree of Court had followed upon it, so that the decree-arbitral was considered in no other light than a private deed\*. When a defender stands inhibited, a clause ought to be inserted in the submission, preserving the effect of the diligence, but how far that would effect third parties, is a question not yet decided. A surer method would be to reserve power to obtain a decree in the depending action, notwithstanding the decree-arbitral, and to take a judgment in terms thereof accordingly; but even to this several objections would occur.

An execution appeared, which did not mention a copy to be left at the market-cross according to the accustomed form. The objection was made and sustained†. At this period it was a frequent device, to grant deeds and obligations blank in the names of the creditor and disponee; and when an inhibition was executed, they attempted to defeat it, by filling up additional names or sums in the blanks of the deeds; but as often as such cases occurred, the Court found that all these operations were struck at by the inhibition. A messenger in executing an inhibition, either omitted to give a copy to the party, or to mention that fact in his execution. The execution was delivered in these terms, and the messenger attempted to supply the omission by a marginal note. The Lords with great propriety found the inhibition null, and that the delivering a copy was a necessary solemnity, which not being contained in the register, they would not admit the same to be supplied by probation‡.

By the act of Parliament, the inhibition must be registered within forty days after the date of the last execution; but it is proper to know whether the effect of the execution takes place from the execution against the lieges, or from the day of the registration. The first determination of this point is found in a case preserved by Dirleton, where the Lords found: ‘ That a disposition being made  
‘ after

\* Kae against Stewart Gilmour.—16th December 1668, Frazer against Keith.—Stair, vol. 1. page 571.

† Napier against Gordon, Feb. 12. 1670.

‡ Keith against Johnston, July 28. 1671.

' after inhibition, but before the registration of the same, may be  
 ' reduced *ex capite inhibitions*; seeing the execution of the inhibi-  
 ' tion doth put the lieges in *mala fide*. And after the same is com-  
 ' plete, and thereby the debtor and lieges are inhibit to give and  
 ' take rights, the inhibition *ipso momento* thereafter is valid and per-  
 ' fect; but *resolvitur sub conditione*, if it be not registered in due  
 ' time \*. Mr Erskine informs us that the rule laid down by this  
 decision, is in force at this moment; but if the case were again to  
 occur, we should be much inclined to try the validity of this doc-  
 trine; for it is now an undeniable fact, that notice of an inhibi-  
 tion is seldom or never to be had by publication; and we are  
 entirely at a loss to find private justice or public expediency in  
 allowing one man who has voluntarily brought his money into  
 danger, by trusting it to the personal security of a debtor, to  
 throw his misfortune upon an innocent purchaser, who means to  
 acquire the property itself, and is taught by the law to depend upon  
 the public records for his safety. The following decision holds up  
 a case, which must since that time have frequently occurred. A cre-  
 ditor apprised an estate for several debts in his person. Upon one  
 of these debts an inhibition had been executed; and upon that title  
 he brought a reduction of a disposition granted by his debtor. The  
 purchaser offered to pay the debt, upon the ordinary condition of  
 obtaining an assignment. Now, the inhibitor's other debts were pos-  
 terior to this inhibition; so that, had he simply assigned, the assignee  
 might have immediately got back his money by reducing these other  
 debts in the person of the cedent. He therefore very sensibly ob-  
 jected, that he could only be bound to discharge in a case of that  
 kind, and not to assign to his own prejudice. The Lords ordained  
 the assignation to be granted, with a proviso that it should not be  
 made use of against the other right in the person of the cedent †.

An

\* Cruickshanks against Watt, Feb. 12. 1675.—Noticed also by Stair of the same date.

† Bruce against Mitchell, Feb. 11. 1676.

An execution of an inhibition appeared, in which the messenger said, that he had lawfully inhibited the lieges. 'It was objected, that this execution did not bear the public reading of the letters at the cross, and crying three several oyes; and that the omission could not be supplied by witnesses.' The Lords found the execution of the inhibition null \*. This was a very proper judgment. The diligence of inhibition is merely a creature of the law: It is entirely composed of forms; and if any part of these be omitted, the creditor has no title to any benefit from the law. Before the statutory order for registration, the whole force of the diligence lay upon the proclamation. The lieges had no other chance of being apprised of their danger; and even since that time the same presumption holds good for forty days after the execution.

When lawyers say that a debt or deed is reduced *ex capite inhibitionis*, it is not meant that the deed is really void; for, *quoad* every other person but the inhibitor, it remains perfectly sufficient; because reductions, *ex capite inhibitionis*, are, properly speaking, declarators; importing no more than that notwithstanding the alienation quarrelled, the inhibitor should have access to effect the lands inhibited for his debt †. And for the same reason, it has no effect but from the date of the sentence; because the deed of alienation by the person inhibited is not simply void, but only voidable; and therefore, in bygone rents, before the date of the sentence, even those *in medio*, and uplifted were found to belong to the disponee, and effectable by his creditors ‡. Two or three years afterwards, another inhibition was produced in Court, bearing to be executed at the dwelling house after several knocks; but did not specify the number of *six* knocks; upon which the Lords found the inhibition *ipso jure* null §. We have heard, that in executions at the market cross,  
pier

\* *Stevenson against Innes*, July 11. 1676.

† *January 7. 1680. Hay against*

*Lady Balgerno.*

‡ *February 1. 1684. Crichton against Anderson.*

§ *July 29. 1680. Hay against Laird of Purey.*

pier and shore, a copy must be affixed at each of these places: A party produced an execution, bearing a copy to be affixed on the cross, without mentioning any copy being affixed on the pier. The defect was objected to, and the inhibition found null \*. As this diligence has extraordinary consequences, every circumstance of its execution has received a judicial determination. A messenger had omitted to mention that he had made three oyes: The Lords sustained the objection, and annulled the diligence †. Execution at the market cross, pier and shore, is only intended to reach those persons actually out of Scotland at the time. Whenever there is any uncertainty about a fact of this kind, our business is to execute the inhibition at the common dwelling place of the party, at the market cross of the sheriffdom at which that house is situated, and at the market cross, pier and shore ‡.

Formerly inhibitions were sustained upon blank summonses, duly executed, which were held to make a dependence. One of these inhibitions coming into Court, the pursuer, conscious of the absurdity, inserted his libel, and produced it to support the inhibition. The Lords reduced the diligence, as wanting a sufficient warrant; but, in order to advertise the lieges of their hazard, they resolved to make an act of sederunt, 'That inhibitions served upon dependencies should engross the tenor of the summons, otherwise should not be sustained §; but, as all summonses must now be libelled before execution, no such point can again occur.

Although inhibitions are generally allowed of course, it is the right of the party against whom they are raised without a sufficient cause, to complain to the Court to have these malicious diligences recalled, as abuses of the law, and order of justice. The Judges always paid due attention to these applications. A liferentrix absolutely

\* February 22. 1681, Ewen against Burnet.  
against Trotter.

† February 1683, London

‡ February 22. 1687, Muschet against Lord Mar.

§ Fountainhall, December 27. 1698, Mill against Cockburn.



lutely secured in her lands inhibited the proprietor ; he immediately complained, and the Lords discharged the registration of the inhibition till it should be tried what foundation there was for it \*.

In the beginning of this century, inhibitions and other diligences came to be obtained in a very easy manner. Not satisfied with having them upon actual dependencies, they were not at the pains even of executing the summons, but produced it signeted with the bill of inhibition. This shameful practice soon received a proper check. An objection was made to one of them, that it proceeded upon a false narrative, as no summons had been executed, and consequently no depending process existed at the time of raising the inhibition; and the Lords found the inhibition null †.

By the 18th act of the 7th parliament of James VI. the clerk to the register of inhibitions is ordered to subscribe an attest of the letters and executions being registered: This, in practice, is done both upon the letters and upon the executions. One of the executions at the market cross was objected to, as not marked or subscribed by the clerk, and the Lords sustained the objection ‡: But, upon the matter being again brought before their Lordships, they altered their opinion, ‘In respect there is no certification of nullity adjoined in the act; and therefore, though the neglect of the clerk’s subscription might subject him to censure, the diligence stands good, being duly recorded; which answers all the end of the clerk’s subscription ||.’ This decision ought not to be trusted to; and it is our business to take care that the clerk shall always subscribe the attest of registration. Lord Bankton adds upon this head, that, if the inhibition be not duly recorded, the same is void, even though the register book for the year, whereon it was marked on the back to be recorded, was wanting; and cites for this a decision, January 25. 1745,—Kennedy §.

There

\* Feb. 15. 1699, Murray against Kelly.  
of Rosehill.

† Feb. 22. 1715. Sir John Clerk against Captain Preston.

‡ June 16. 1727, Ducheſs of Argyle against M’Niel.

† Nov. 22. 1714, Creditors

§ Vol. 1. p. 195.—126.

There are some actions where the libel is general; such as count and reckoning, and others, in which no special sum or balance is libelled against the defender. The hardship and impropriety of admitting the diligence of inhibition, upon account of a claim without specification, was represented; and the defender contended, that actions of that kind could not be a ground for the diligence. The answer given was, That practice admitted that mode of libelling, and the law admitted inhibitions upon every depending action. The Lords sustained the inhibition; which, indeed, for any thing appearing, ought not to have been done. If a pursuer cannot specify the exact amount of his debt, he has no right to tie up his parties hands by an extraordinary remedy, which should only belong to a certain debt: However, so it is to this day; whether a man is unjustly or generally inhibited, he must be at the expence of an application to do himself a common piece of justice\*.

An estate was sold in consequence of a voluntary right from a bankrupt, and the price about to be divided among the creditors: An inhibitor attempted to reduce the sale; but the Lords, with perfect propriety, refused to allow it, 'In respect that he could not allege the sale was at an under value, and that the price remained *in medio* †.'

It is clear, from the nature and style of this diligence, that it can extend no further than to the exact debt upon which the inhibition is raised. The debtor is to do no deed which may prejudice the complainer 'anent the fulfilling to him of the obligation, decree, or process, produced to the Lords.' From this it follows, that an inhibition, used upon a bond, can go no further than the debt and annualrents therein contained: Consequently, the effects of a bond of corroboration, so far as regards the accumulation of the debt, will be cut off by a second inhibition intervening, at the instance of another credi-

\* November 1722, Competition of Creditors of Tofts.

† February 1. 1739, Carlyle against the Trustees of Mathieson's Creditors.

tor \*. This point is established by repeated decisions. Where, therefore, a debt is secured by an inhibition, and afterwards corroborated, if the sum be considerable, the secure method would be to execute a second inhibition upon the bond of corroboration, which would at least secure the accumulations against all posterior creditors.

When an inhibition is executed against a man residing in a different part of the country from that in which his ordinary dwelling house is situated, it is to be considered whether he has lived in that place forty days; for that space constitutes a domicile in the spot of his present residence; and therefore the inhibition must be published at the market cross of the head borough of the county where he lives at the time. This was the next point in the business determined by the Court. It was objected, 'That an inhibition recorded in one jurisdiction was not effectual as to lands in another; but that publication must necessarily be at the head burgh of the jurisdiction where the party dwells for the time; and that in no case is it regular to execute an inhibition personally at a debtor's dwelling house within one jurisdiction, and against the lieges at the market cross of another.' The Lords sustained the objection to the inhibition, that the same was not published within the jurisdiction where the debtor lived at the time of executing †.

A debtor possessed of a good estate, thought himself entitled to complain of an inhibition being executed against him, as his circumstances were unquestionably good. But 'the Lords refused to recall the inhibition, being of opinion, that, let a man's circumstances be what they will, an inhibition against him could not be stopped, when used for a *liquid debt*. The more solvent the debtor is, the less excusable is the deferring payment; by procuring which, inhibition, imprisonment, and other legal compulsitors, have been contrived.'

\* June 27. 1745, Rutherford against Stewart.

† July 27. 1745, Dunbar against the Creditors of Grangehill.

‘contrived.’ The pursuer had been encouraged to this point by a determination of the Judges, given in the case of the Royal Bank in July 1728; but, though the debt claimed against the Bank was a just one, the inhibition appeared to be malicious, as the credit of the Company was fully and completely known and established.

The next decision, which regards the matter of execution, seems flatly to contradict the case of Dunbar, determined in July 1745. An inhibition had been personally executed against a debtor at Edinburgh, who commonly resided at Banff; and the letters were published at the market cross of Banff. This inhibition was objected to, because it had not been executed at the market cross of Edinburgh, where the debtor resided at the time. The Lords repelled the objection. In the case of Dunbar, the Judges found, that the inhibition must be published at the market cross of the debtor’s *residence for the time*, in preference to that of his ordinary domicile; and, on the very next occasion, they find, that the ordinary domicile was preferable to the occasional residence: Nay, Lord Kilkerran hints, that it was not thought clear that publication at the last place would not have been liable to objection; which is just telling us that either way will do, and yet both are doubtful. How is a practitioner to conduct himself upon a matter of this kind, between the absolute and occasional residence of his party? If his information be not very explicit, his only method is to publish at both market crosses, and register letters in both counties, or in the general register. In the same process another point occurred, which it is material to attend to. An inhibitor, forty days after the first publication of his inhibition, discovered that his debtor was possessed of lands in Sutherland and Murray; he therefore published it again at the market crosses of Sutherland and Murray. This was objected to, and the objection sustained; ‘In respect of the express directions of the act 119th, ‘parliament 1581, which requires no publication at any other cross than that of the head burgh of the shire where the party dwells, ‘and registration within forty days thereof; and enacts, that, where ‘he

‘ he has lands in another shire, the inhibition be registered, within the same forty days, in the books of the said shire \*. The same questions came soon after under the cognisance of the Court in another shape. When a debtor happened to be out of the kingdom, the practice was to execute the inhibition against the lieges at the market cross of Edinburgh, pier and shore of Leith, as well as against himself; but this practice was not uniform; for sometimes, when the party had a known residence in the country, inhibitions were executed at the market cross of the jurisdiction in which his dwelling house was situated. In this manner an inhibition happened to be executed against Sir Alexander Murray of Stenhope; and, in the ranking of his creditors, the diligence met with the objection, that, by the practice, all edictal executions for publication were made against the lieges at the market cross of Edinburgh, pier and shore of Leith, when the party is out of the kingdom. ‘ The Lords repelled the objection †.’ To this decision Lord Kilkerran has been pleased to add some observations: But his opinion is in direct contradiction to the decision of Dunbar, and, indeed, it is not easily understood. His Lordship says, ‘ That though a man reside at Edinburgh or Glasgow a sufficient time to constitute a domicile, yet the execution of the lieges must be at Orkney, or wherever his ordinary residence is.’ In fact, we all know that these executions answered very little purpose any where; and therefore, all reasoning upon their supposed effects lead to error; for the law has bound the lieges in general to the form of the publication; and therefore, no one part of the people have a better right to hear it than another: But what are we to make of the distinction between an ordinary and extraordinary place of residence; for the only idea which the law gives us of the constitution of a domicile, is an actual change of the former residence to the latter; and in this confusion we know

no

\* Dec. 1748, Creditors of Kinminnity against Innes.

† Feb. 2. 1750, Creditors of Sir A. Murray against the Earl of March.

no remedy but that already mentioned, the publication in both ; and that where the party is out of the kingdom, as well as when he is in it. This decision only gives birth to a number of new difficulties : For example, what is to be done where a man has no known or ordinary dwelling house, and yet is out of the kingdom ? Surely the market cross of Edinburgh is the only place where such an inhibition can be published ; although it would certainly be more safe to publish it both at the market cross of Edinburgh, and at the market cross of the county where his lands lay. It is true that the style does not bear an express warrant for inhibiting the lieges at the market cross, pier and shore. It will follow as a direct consequence, that the lieges out of the kingdom cannot be inhibited ; and, consequently, that any of them may safely contract with their own countrymen abroad, and plead the above decision in their favour. On the other hand, it is to be considered, that practice alone introduced the inhibiting of the debtor at the market cross, pier and shore ; and the same custom has also introduced the publication against the lieges at these places ; consequently, both customs should be held equally good.

As this singular diligence did not affect moveables, it followed that it did not reach to the bygone annualrents upon heritable subjects, because these are moveables falling to executors ; but the effect of the inhibition is not regulated by the simple distinction of heritable and moveable. There are several things heritable in a strict sense which are not reached by inhibition ; such as heritable bonds upon which no infeftment has followed, and bonds including executors, &c. Charters, dispositions, and other rights to land, are reached by this diligence, though no infeftment followed upon them ; and even heritable bonds upon which infeftment has followed, though rendered moveable by requisition or change, are still in the same predicament. It is material, therefore, for us to know the exact criterion which established this distinction. A case came before the Court relative to inhibition, which in a great measure determined

terminated this material point. A creditor, in virtue of an heritable bond upon the estate of Langton, by a deed in the 1732, conveyed the annualrents of an heritable debt due from the 1723. This conveyance was sought to be reduced upon an inhibition executed in the 1730; and the Lords upon a hearing unanimously found, 'That the conveyance was not affected by the inhibition.' Another objection occurred against the same inhibition; the bill, it seems, was passed upon production of letters of horning, without the grounds of debt; and the letters bore, '*because the Lords had seen the letters of horning.*' Lord Kilkerran tells us, 'That the Court was inclined to have sustained the objection, as there is no other legal ground for an inhibition, but either a decree, a liquid instruction of the debt, or a summons executed; but a horning is neither: A creditor may have got payment of his debt, and not delivered up the horning; and, by the same rule, an inhibition might proceed upon a caption; but no interlocutor was pronounced upon it, as unnecessary, after having found the inhibition ineffectual, even if it had been formal \*.' This point came again before the Court in the 1751. Falconer reports, that it was pled in support of the inhibition, 'That a horning, which could not have been got without a bond, is evidence of the debt. Inhibitions pass on decreets without their grounds on summonses; and against heirs on general charges. Upon this,' continues he, 'it was observed by the Court, that practice only determined on what foundation this diligence might proceed, as it was difficult to know on what principles this was settled at first †.' This practice was a very bad one. The decision is not to be trusted to, for the very good reason mentioned by Lord Kilkerran; and it is not supposed that an inhibition of this kind would now, as it was then, be supported.

The

\* June 15. 1750, Scott against Coutes and others.

† July 3. 1751, Scott against Creditors of Langton.

The style of the letters, among other alienations, particularly prohibits that of tacks; but by this it is not to be understood that a landholder is incapacitated from granting leases of his estate; for these are not sales, but acts of administration. The meaning of the letters is, that a tacksmen shall not alienate his leases to the prejudice of his creditor; for leases, with us, are ranked amongst absolute immovables; and therefore their alienation is expressly struck at by the diligence of inhibition.

After this prohibitory writ came to be currently issued upon depending actions and undetermined claims, it came also to be granted upon bills, and other grounds of debt, without putting them even upon record. This, indeed, generally happens when the inhibition is applied for before the term of payment of these debts, and, consequently, before the creditor be entitled to a decree of registration. Such inhibitions may be either stopped or recalled, unless the creditor can point out a change of circumstances in the debtor, entitling him to such a preventative remedy. The change, in law language, is expressed by the phrase *vergens ad inopiam*.

We have heard that the inhibition, being only personal to the debtor, falls at his decease; and that the heir is at liberty to sell, unless the diligence be renewed against him. It is necessary therefore to know how this is to be most effectually done. Every heir may either accept or renounce the succession falling to him by the death of any of his predecessors, as he finds it most suitable to his interest. For this purpose, the law allows him a year for deliberation; within which no process can proceed, or execution pass against him. As the heir is not debtor in the obligation, he cannot be inhibited upon a deed with which he has no apparent connection: The debt must be connected with him by a summons; which, being duly executed, gives ground for inhibiting upon the dependence. Anciently, it was not allowable to execute a summons within the year of deliberation; but it may now be done, provided the day of appearance falls without the year. But it may be uncertain whether the person inhibited



be legal heir or not, or whether or not he may renounce. If he does so, no personal decree can go out against him; and, as the effect of all inhibitions upon depending actions rests upon the decree, if none be recovered, the inhibition falls to the ground. The first step against an heir, in the recovery of a debt, is to charge him to enter within forty days, in virtue of letters of general charge. The charge to enter upon these letters was admitted not to be a pursuit or execution, but a step preparatory to it; and therefore the heir was allowed to be charged to enter, within the year of deliberation. As a summons could not be executed in that time, creditors thought of inhibiting apparent heirs upon the general charge, holding that to be a dependence against them. This was contrary to the principle of allowing the general charge itself; but the Lords, influenced by the idea of expediency, inclined to sustain these inhibitions, because the heir might otherwise disappoint or defraud the predecessor's creditors; which was a stretch made against the intendment of the general charge, and in contradiction to its form. These letters never specified the debt: They only stated, in general, that the complainant had sundry claims and actions to pursue against the estate of the deceased, from which he stood prevented by the heir lying out unentered. This fixed style proved that the general charge, the creature of a particular statute, was never meant to found any diligence, or serve any other purpose than what that statute directed; and it was least of all fitted to the inhibition: When, therefore, the objection came to be made, the Lords annulled the inhibition, proceeding upon a common general charge; nor would they admit the answer, that the debt stood particularised by the consequent summons\*. Our lawyers soon understood, and profited by this distinction. A general charge, in which the debt was specially libelled, came to be tried, which was accordingly sustained†. When, therefore, we intend

\* June 25. 1706, Davidson against Randal.

† Feb. 17. 1713, Livingston against Forrest.

intend to inhibit an heir upon a general charge, we must be careful to recite the debt, or debts, in the same manner as they are done in any other diligence; and we may add the general words, that the complainer has fundry other actions and claims. An inhibition upon a general charge, against an apparent heir, is thought to be preferable to that upon a common summons; because the heir cannot be inhibited properly within the year of deliberation upon a common summons; and therefore the inhibition upon the general charge secures against his deeds in the mean time; and, if the summons be not called in Court within a year, the instance falls, and the inhibition with it, whereas the other remains good, and takes full effect both on the estate of the ancestor in the mean time, and the proper estate of the heir himself, so soon as he enters to his predecessor's.

We have now endeavoured to give a detail of the practice in the matter of inhibition. It will no doubt be observed that we have said nothing upon a very material point, the effect which this diligence has in the ranking of creditors. To enter upon that distinct branch of business would at present lead us greatly too far: It is reserved for the process of ranking and sale, which well deserves a title for itself. In the mean time, we take leave of the present subject with a few words relating to the discharging, or, as it is termed, *purging* the inhibition. This is done by a simple discharge of the debt and diligence, containing the usual clause of registration. The inhibition and registration is always specially recited in the discharge, which is generally registered in the books of Session, in order that it may be pointed out at any time, to balance the record of the diligence. It is certainly a very great defect that the same register does not take in both the inhibition and the discharge, whereby a kind of charge and discharge might easily be kept with respect to the inhibitions against the landed interest of Scotland.















